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ON RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 6[illegible]

THE BORDEN COMPANY, PETITIONER,

vs.

JOSEPH MORELLA, CHARLES J. BURKE, WALTER CROSS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 16, 1944.

CERTIORARI GRANTED JANUARY 2, 1945.

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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

JOSEPH BORELLA, CHARLES J. BURKE, WALTER CROSS, WILLIAM L. DEGRAAF, JOHN B. DONEGAN, STANLEY GAYDA, EDWARD GRAMCKO, STANLEY GRZECK, OLE HOFSETH, WILLIAM KAY, ALEXANDER KRUPICA, WILLIAM LENDO, THOMAS LO SASSO, ROBERT A. MARSHALL, WALTER C. MENYHART, JAMES MCCARTHY, MICHAEL NOVEMBER, LEONARD B. QUINN, ANDREW RUEB, THOMAS M. TREACY, and JESUS ECHEVARRIA,

Plaintiffs-Appellants,

against

THE BORDEN COMPANY,

Defendant-Appellee.

Statement Under Rule 13.

This action was commenced by the service of the summons and complaint on February 26, 1943. The answer of the defendant was filed on April 8, 1943.

The names of the original parties were as follows: Joseph Borella, Charles J. Burke, Walter Cross, William L. DeGraaf, John B. Donegan, Stanley Gayda, Edward Gramcko, Stanley Grzeck, Ole Hofseth, William Kay, Alexander Krupica, William Lendo, Thomas Lo Sasso, Robert A. Marshall, Walter C. Menyhart, James McCarthy, Michael November, Leonard B. Quinn, Andrew Rueb, Thomas M. Treacy, on behalf of themselves and on behalf of other employees of the defendant similarly situated. At the trial Jesus Echevarria was added as a party plaintiff, and the action was discontinued as to all parties plaintiff except those specifically named.

Statement Under Rule 13.

There has been no arrest or bail taken or property attached or arrested in this action.

The trial was had on October 19, 1943, before Hon. Edward A. Conger, sitting without a jury.

No question was referred.

Final judgment was entered on February 17, 1944.

Notice of appeal from said final judgment was filed by plaintiffs on February 28, 1944.

Summons.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOSEPH BORELLA, CHARLES J. BURKE, WALTER CROSS, WILLIAM L. DEGRAAF, JOHN B. DONEGAN, STANLEY GAJDA, EDWARD GRAMCKO, STANLEY GRZECK, OLE HOFSETH, WILLIAM KAY, ALEXANDER KRUPICA, WILLIAM LENDO, THOMAS LO SASSO, ROBERT A. MARSHALL, WALTER C. MENYHART, JAMES MCCARTHY, MICHAEL NOVEMBER, LEONARD B. QUINN, ANDREW RUEB, THOMAS M. TREACY, on behalf of themselves and on behalf of other employees of the defendant similarly situated,

Plaintiffs,

against

THE BORDEN COMPANY,

Defendant.

Civ. 20–425

To the above named Defendant:

YOU ARE HEREBY SUMMONED and required to serve upon Newgrass & Nayfack, plaintiffs' attorneys, whose address

is 350 Madison Avenue, New York City, New York, an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

GEORGE J. H. FOLLMER,
Clerk of Court.
(Seal)

Dated: February 26th, 1943.

Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Plaintiffs, by their attorneys, Newgass & Nayfack, for their complaint, allege:

I. This action is brought to recover from the defendant unpaid overtime compensation, an additional equal amount as liquidated damages and reasonable counsel fees under the provisions of the Act of June 25, 1938, c. 676, 52 Stat. 1069, 29 U. S. C. Sections 201-219, known as the Fair Labor Standards Act, a law of the United States regulating interstate commerce.

II. Jurisdiction is conferred on this court by reason of Section 24 (8) of the Judicial Code, 28 U. S. C. Section 41 (8), which provides that the district court shall have original jurisdiction of all suits and proceedings arising under any law regulating interstate commerce.

10 *Complaint.*

III. Plaintiffs are service and maintenance employees of the defendant at its business building located at 350 Madison Avenue, Borough of Manhattan, City and State of New York, and former service and maintenance employees of the defendant at said building, and have brought this action on their own behalf and on behalf of other employees of the defendant similarly situated.

IV. Defendant is, and at all times hereinafter mentioned was, a foreign corporation organized under the laws of the State of New Jersey, and is and was engaged in doing business in this state and district. The defendant has consented to be sued in this state and district by desig-
11 nating an agent to accept service of process on its behalf pursuant to the laws of the State of New York. All of the acts complained of were transacted by the defendant at defendant's building at 350 Madison Avenue, Borough of Manhattan, City and State of New York, and the employment of the plaintiffs and other employees of the defendant similarly situated, and all records pertaining thereto, were an essential and integral part of the business of the defendant and occurred within the jurisdiction of this court.

V. Defendant is, and at all times hereinafter mentioned was, the owner and operator of a twenty-four story business building located at 350 Madison Avenue, Borough of Manhattan, City and State of New York.

12 VI. At all times hereinafter mentioned the defendant and its subsidiaries occupied approximately seventeen floors of said business building and engaged in interstate commerce and the production of goods for interstate commerce in said building. The business of the defendant and its subsidiaries was conducted on an interstate and international basis and consisted mainly of the production, distribution and sale of fluid, condensed and cassein milk, ice cream, butter, cheese and other products manufactured

from milk, and other products. Said business was managed, operated, directed and controlled by the defendant and its subsidiaries from said business building. The rest of said building was occupied, pursuant to written agreements of lease and otherwise, by numerous persons, firms, partnerships, associations and corporations, a substantial number of whom were engaged in interstate commerce and the production of goods for interstate commerce.

VII. During the period from October 24, 1938 to the date of this complaint, defendant employed plaintiffs and other employees of the defendant similarly situated, in connection with the operation and maintenance of said business building, as porters, elevator operators, watchmen, service and maintenance men. Plaintiffs were engaged in interstate commerce and in the production of goods for interstate commerce in said building during the period aforementioned. The functions performed by said employees were an essential and integral part of the interstate and international business of the defendant and its subsidiaries and the tenants in said building and were necessary for the production of goods in interstate commerce.

VIII. During said period, the defendant employed plaintiffs and other employees of the defendant similarly situated, for work weeks in excess of forty-four hours for the year commencing October 24, 1938; for work weeks in excess of forty-two hours for the year commencing October 24, 1939, and for work weeks in excess of forty hours after October 24, 1940, without compensating them for such excess time at a rate of one and one-half times the regular rate at which they were employed, all of which was in violation of the Fair Labor Standards Act, 29 U. S. C. Section 207.

IX. As a result of the violations by the defendant of the Act as aforesaid, there became due and owing to the

16 *Complaint.*

plaintiffs and other employees of the defendant similarly situated the sum of at least Ten Thousand ($10,000.) Dollars. Plaintiffs are unable to determine the exact amount thereof because of the fact that all records, books and accounts are maintained by the defendant herein.

X. In addition to the amounts due from the defendant to plaintiffs and other employees of the defendant similarly situated, plaintiffs also claim, on their own behalf and on behalf of other employees of the defendant similarly situated, an additional amount equal to the sums due, as liquidated damages, as provided by the aforesaid Act, Section 16 (b) thereof.

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XI. In accordance with the provisions of the said Act, Section 16 (b) thereof, request is hereby made for reasonable counsel fees, interest and costs of the action to be assessed against the defendant.

WHEREFORE, plaintiffs demand judgment against the defendant for all sums which may be found to be due to plaintiffs and other employees of the defendant similarly situated, and for an additional equal amount as liquidated damages and for reasonable counsel fees, interest and costs of this action.

NEWGASS & NAYFACK,
By GEORGE W. NEWGASS,
18 Attorneys for Plaintiffs,
Office & P. O. Address,
No. 350 Madison Avenue,
Borough of Manhattan,
New York City.

Answer.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

The defendant by Milbank, Tweed & Hope and John A. Kelly, its attorneys, answering the complaint herein:

1. Answering Paragraph I of the complaint, admits that this action is brought to recover from defendant alleged unpaid overtime compensation, an additional equal amount as liquidated damages and reasonable counsel fees under the provisions of the Act of June 25, 1938, c. 676, 52 Stat. 1069, 29 U. S. C. Sections 201-219, known as the Fair Labor Standards Act, a law of the United States regulating interstate commerce, but denies that there is any unpaid overtime compensation due the plaintiffs, that plaintiffs are entitled to any additional amount as liquidated damages and that plaintiffs are covered by the provisions of said Act.

2. Answering Paragraph II of the complaint, admits that Section 24 (8) of the Judicial Code, 28 U. S. C. Section 41 (8) confers original jurisdiction on the district court of all suits and proceedings arising under any law regulating commerce without regard to the citizenship of the parties or the sum or value in controversy, but denies that plaintiffs are covered by said Act and that there is any unpaid overtime compensation due to said plaintiffs.

3. Admits the allegations of Paragraph III of the complaint, except that it is without knowledge or information sufficient to form a belief as to the truth of the averment in said Paragraph III that this action is brought on behalf of other employees of the defendant similarly situated.

4. Answering Paragraph IV of the complaint, admits the averments thereof except that it denies that the services performed by the plaintiffs and other employees similarly situated were performed in commerce or the production of goods for commerce, that the plaintiffs and such other employees are covered by the Fair Labor Standards Act, that the defendant violated said Act and that there is any compensation due the plaintiffs and such other employees, and further denies that the employment of the plaintiffs and other employees of the defendant similarly situated, and all records pertaining thereto, were an essential and integral part of the business of the defendant and occurred
23 within the jurisdiction of this court.

5. Answering Paragraphs V and VI of the complaint, admits that at all times mentioned in the complaint it was and now is the owner and operator of a twenty-four story office building located at 350 Madison Avenue, Borough of Manhattan, City and State of New York, and during such times it did occupy and now occupies approximately seventeen floors of said office building; that the business of the defendant was and is conducted on an interstate and international basis and consisted and now consists mainly in the sale and distribution of fluid, condensed and evaporated milk, casein, ice cream, butter, cheese, and other products manufactured from milk, and other products; that the rest of said office building was and is occupied pursuant to
24 written agreements of lease, and otherwise, by numerous persons, firms, partnerships, associations and corporations, and except as herein admitted, denies each and every averment in said Paragraphs V and VI, except that it is without knowledge or information sufficient to form a belief as to whether or not a substantial number of the tenants of the defendant in said office building were or are engaged in interstate commerce and the production of goods for commerce; and it alleges that during all of the times mentioned

in the complaint and at the present time no goods are produced for commerce in said building by the defendant, its subsidiaries or any of the tenants in said building.

6. Answering Paragraph VII of the complaint, admits that during the period from October 24, 1938 to the date of the complaint it employed plaintiffs and other employees of the defendant similarly situated in connection with the operation and maintenance of said office building as porters, elevator operators, watchmen, service and maintenance men, and except as herein admitted denies each and every averment of said Paragraph VII.

7. Answering Paragraph VIII of the complaint, admits that during the period from October 24, 1938 to the date of the complaint the defendant employed service and maintenance employees in said building for work weeks in excess of 44 hours for the year commencing October 24, 1938; for work weeks in excess of 42 hours for the year commencing October 24, 1939, and for work weeks in excess of 40 hours after October 24, 1940, and that except for the period commencing May 1, 1942 it did not pay its service and maintenance employees in said building on a regular hourly rate up to the number of hours set out in the Fair Labor Standards Act and one and one-half times such regular rate for time worked in excess of such hours, and, except as herein admitted, denies each and every averment of said Paragraph VIII, and alleges that neither the plaintiffs nor any other employees of the defendant similarly situated are covered by the provisions of the Fair Labor Standards Act of 1938 and that there is no overtime due them by reason of the provisions of said Act.

8. Answering Paragraph IX of the complaint, denies each and every averment of said Paragraph, except that the defendant is without knowledge or information sufficient to

form a belief as to the truth of the averment that the plaintiffs are unable to determine the exact sum claimed to be due them because of the fact that all records, books and accounts are maintained by the defendant herein, and alleges that the defendant did not violate any terms and provisions of the Fair Labor Standards Act of 1938 and that it has paid the plaintiffs and other employees of the defendant similarly situated in full for all services rendered by them to the defendant.

9. Answering Paragraphs X and XI of the complaint, alleges that neither the plaintiffs nor other employees of the defendant similarly situated are covered by the provisions of the Fair Labor Standards Act of 1938, and that consequently they are not entitled to recover any amount as liquidated damages, counsel fees, interest or costs of the action.

FOR A FIRST DEFENSE, THE DEFENDANT, UPON INFORMATION AND BELIEF, ALLEGES THAT:

10. No one of the named plaintiffs herein is the authorized agent for the purpose of bringing suit to recover alleged unpaid overtime wages under the Fair Labor Standards Act of any other employee employed in said office building by the defendant.

11. The attorneys for the named plaintiffs herein are not authorized by any employee other than the named plaintiffs employed in said building to bring this action.

FOR A SECOND DEFENSE, THE DEFENDANT, UPON INFORMATION AND BELIEF ALLEGES THAT:

12. At all times mentioned in the complaint the defendant was and now is the owner of and operated, maintained and

controlled the office building at 350 Madison Avenue in the City, County and State of New York.

13. During all of the times that the defendant has owned said building, no manufacturing has been done in the building and no goods have been produced for commerce therein.

14. In performing their duties the plaintiffs herein and other employees of the defendant similarly situated were not engaged in commerce, were not engaged in the production of goods for commerce and were not covered by the provisions of the Fair Labor Standards of 1938.

WHEREFORE, the defendant demands judgment dismissing the complaint together with the costs and disbursements of this action.

MILBANK, TWEED & HOPE,
and
JOHN A. KELLY,
By John A. Kelly,
15 Broad Street,
New York, N. Y.,
Attorneys for Defendant.

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Plaintiffs' Exhibit 1.

Deposition of Stephen Everett Wyman.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Deposition of STEPHEN EVERETT WYMAN, pursuant to stipulation, at Room 1014, 350 Madison Avenue, New York City, commencing on the 29th day of April, 1943, at 2 P. M.

35 PRESENT:

NEWGASS & NAYFACK, Esqs., Attorneys for Plaintiffs GEORGE W. NEWGASS, NATHAN COOPER, and LEO H. HIRSCH, JR., of Counsel

MILBANK, TWEED & HOPE, Esqs., and JOHN A. KELLY, Esq., Attorneys for Defendant
JOHN A. KELLY and GEORGE F. KEENAN, of Counsel

STEPHEN EVERETT WYMAN, Witness.

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the parties hereto, that notice of the taking of this deposition be waived; that the deposition of Stephen Everett Wyman be taken before Bessie M. Schwartz, a
36 Notary Public, at Room 1014, 350 Madison Avenue, New York City, to commence on the 29th day of April, 1943, at 2 P. M.; that all objections as to the qualifications of said Notary be waived; that this deposition may be read in evidence upon the trial of this action regardless of the availability of the witness at such time; that the filing of this deposition be waived; that compliance with Rule 13 of the Local Rules of this Court be waived; that this deposition may be sworn to by the witness before any Notary Public, and that a copy of this deposition shall be delivered to the attorneys for the defendant.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } SS.:

STEPHEN EVERETT WYMAN, being first duly sworn by Bessie M. Schwartz, a Notary Public, testified as follows:

DIRECT TESTIMONY:

Q. What is your full name? A. Stephen Everett Wyman.

Q. Where do you reside? A. 24 Monroe Avenue, East Orange, New Jersey.

Q. What is your occupation? A. Accountant.

Q. Are you an independent accountant or are you employed by some one? A. The Borden Company. 38

Q. Where are you employed? A. 350 Madison Avenue.

Q. How long have you been in its employ? A. 35 years.

Q. Will you tell us what is the nature of your work as an accountant for the Borden Company? A. The issuance of accounting instructions, as pertaining to the Manufactured Products Division of the Borden Company.

Q. Where is your office? A. In this building.

Q. Will you tell us, in detail, what your work consists of for that particular division you mentioned? A. I did tell you.

Q. Do you hold any office with the Borden Company? A. Controller of the Manufactured Products Division.

Q. Will you please explain your duties and the duties of your accounting office in connection with the division 39 that you are connected with? A. The issuance of all accounting instructions to the various factories located throughout the United States with respect to reporting to the home office, 350 Madison Avenue, as to production figures, disbursements, receipts, and the issuance of factory shipped goods through the medium of invoices; instructions pertaining to the deductions that would be made for Federal social security and unemployment insurance, vic-

tory taxes, and the proper method of so reporting through the payroll records; the establishment and perfection of financial statements with respect to the recording of sales, costs of sales, deductions, selling and administration expenses to arrive at net profits; supervision of a staff of traveling auditors to visit each factory for the purpose of internal control; supervision of personnel matters in connection with factory and subsidiary employees; supervision of the entire accounting department at the home office, 350 Madison Avenue. I think that generally covers it.

Q. Are you familiar with the activities of the Borden Company in premises 350 Madison Avenue, New York
41 City? A. The activities of the different departments, yes.

Q. Is it part of your duties as controller to be familiar with the activities of this company? A. No, none other than the accounting part.

Q. Where is your accounting department in this building? A. It is on the eighth, ninth and tenth floors.

Q. What departments or divisions of the Borden Company are in the home office building of the Borden Company at 350 Madison Avenue, New York City? A. We will start in the basement—maintenance and elevator men.

Q. I would like to know what is down there? A. Do you mean in the form of restrooms?

Q. What have you got down in the basement; how is it fitted up? A. We have a boiler room, a rest room, the
42 machinery equipment room.

Q. If that is all there is in the basement, let us go to the ground floor. A. On the ground floor there is the bank, Eastman's, and Stuart, the tailor, the information desk and a cigar counter.

Q. Are there any Borden activities on the ground floor? A. None other than an inquiry desk.

Q. You have a starter there too, have you not? A. As part of the maintenance men.

Q. Please go to the next floor. A. On the second floor we have part of the Casein Division of the Borden Company, and the Borden Company store. I am not in any way describing the tenants on each floor. This is Borden's I am talking about. On the third floor we have the main office of the Casein Division, the National Milk Sugar Department, General Traffic Department, telephone switchboard and operator. On the fourth floor, all sales activities. On the fifth floor, sales activities and legal department. Sixth floor, credit department and mail room. I am not sure whether our label room is down there or not, as we have shifted around so much. Seventh floor, manufacturing departments. Eighth floor, accounting department. Ninth floor, accounting department and income tax division. Tenth floor, account, controller's office and photostat room. Eleventh floor, executive offices. Twelfth floor, general controller (The Borden Company), central transcribing bureau and treasurer's office. The treasurer is on the eleventh floor, but the employees are both on the eleventh and the twelfth due to office supplies as a matter of convenience. Thirteenth, purchasing department. Fourteenth, employee relations department, safety bureau, and stationery department. Fifteenth, special products division (a self-contained unit). Sixteenth, ladies' rest room, general advertising department, bureau of insurance. Seventeenth, Borden's experimental kitchen and Borden's experimental laboratory. Eighteenth, nothing. Twenty-first, real estate department. Nineteenth, department of industry relations.

Q. Is the floor plan that you testified to approximately the floor plan of the Borden Company's activities in this building for the period subsequent to October 24, 1938? A. No.

Q. Are the activities of the various departments and divisions of the Borden Company which you have referred to in your prior answer, the same as the activities which

existed here subsequent to October 24, 1938 to the current date? A. Yes, with the exception of the employee relations and industrial relations departments, which were created in October 1942 and April 1, 1943.

Q. Will you please tell us, in your own words, what the activities of the Borden Company are in premises 350 Madison Avenue, New York City? A. The basement is the office of the maintenance employees and the realty division.

Q. Who is in charge of the office of the maintenance employees in the basement? A. I would rather not answer that question, as I am not too sure.

Q. Are there any other activities in the basement of the
47 building? A. No.

Q. What are the activities of the maintenance employees in the basement of the building? A. I do not care to answer that because I am not altogether sure that my reply would be accurate. Mr. Marshall would be the person to know.

Q. Let's go to the ground floor. A. We have the information desk. On the second floor we have part of the casein division, then we have the Borden's employees' store.

Q. About the casein division—what is actually done by the casein division of the Borden Company on the second floor? A. They handle our advertising, circulars and different formulas in book form for the use of casein products.

Q. Will you tell us what casein products are? A. It is a product made from skim-milk powder.

Q. Do you have a special mailing division down there
48 in connection with the casein business on the second floor? A. Yes.

Q. What is mailed out from those offices of the casein division? A. What I have mentioned.

Q. Do you mail out any samples of casein to consumers? A. No.

Q. You only mail these booklets and brochures? A. Yes.

Q. Can you tell us how casein is used by the public or by manufacturers or people who might be interested in that particular product? A. In the manufacture of plyboard.

Q. Can you list some of the uses of casein? A. Manufactured into a glue which is used in the manufacture of plywood, used for repairing household furniture, etc.

Q. Isn't it used to make fluid milk? A. No. Buttons are made out of casein, combs, hair brush backs, tooth brush holders, handles. It is a plastic.

Q. Will you tell us how casein is sold to the public? How do you get your purchasers of casein? A. Through the medium of advertising.

Q. How do you obtain the list of people to whom you send the advertising material from the casein division of the Borden Company? A. Through advertising medium. They write to us pursuant to an advertisement. 50

Q. What is the form of advertisement that you usually insert in magazines? A. That can be very diversified. We might say: "Are you going to build a boat this summer? Are you going to make a fishing rod? If so, we would recommend the use of Casco cement or casein glue."

Q. The advertisement would state that the information about the casein product can be obtained from the home office? A. No. It would say: "If you are interested in a sample, please communicate with Casein Company, 350 Madison Avenue."

Q. In what publications would these advertisements appear? A. Saturday Evening Post, Popular Mechanics, and that type of magazine; other national periodicals and papers circulated throughout the country, and trade publications. 51

Q. Does the casein division send out samples pursuant to those letters which it receives from these advertisements? A. Yes.

Q. They are sent out from these premises? A. No, from the factories.

Q. Where are these factories? A. One at Bainbridge, New York, and one at Seattle, Washington.

Q. Are these samples sent to people requesting them on a nation wide basis? A. Yes.

Q. How are these samples sent? A. Parcel post, generally, under directions from the home office.

Q. What is the procedure of the casein division with respect to these letters of inquiry which they receive in connection with their advertisements? A. The request for a sample is received by this office and forwarded to one of the casein factories for shipment to the respective customer.

Q. Is the original letter of the customer sent to the factories in Bainbridge or Seattle or does an order go out from
53 this office based on the letters received here asking them to send the samples? Do they confirm at the factory that these samples have been sent to people requesting them? A. The original letter or advertisement placed on a post card and mailed to 350 Madison Avenue does not go directly to the factories, but a sample order form is prepared in duplicate listing the names of the prospective customers requesting samples and this form is sent to the factory. When samples are shipped from a factory to the prospective customers there is a notation made on the original copy that samples have been shipped and the original copy returned to 350 Madison Avenue files.

Q. Are there any other activities of the casein division in addition to what you have just mentioned, regarding orders or sales of casein products? A. You mean with re-
54 spect to their sales? They would be handled exactly the same way.

Q. How would they be handled? A. You take a large plywood manufacturing concern. They would send their order into New York here, unless it were prearranged that there be a stipulated amount to be shipped every week, ten days or once a month. The factory would have a standing order for those shipments. Those contracts wouldn't necessarily have to come through this office. Those contracts

could be made outside the office through contact with the management.

Q. Where you have a standing contract to deliver these goods, wouldn't it have to come through this office? A. No.

Q. What would the salesman do? Would he communicate directly with the factory or advise the home office? A. He would be the top man in the office, or our salesman could make the contacts.

Q. Once he had made the contacts and sold an order for so much casein periodically, would he then communicate directly with the factories in Bainbridge or Seattle or would he advise the New York office in this building, which would then advise the respective factories? A. No, he 56
would send them direct to the factories.

Q. Then the casein division have salesmen operating out of this office in the building? A. I would say yes.

Q. About how many salesmen do they have? A. I couldn't say that.

Q. What part of the casein business done out of this building is regular business of the casein division, as distinguished from the business that you get from time to time from advertisements inserted? A. I wouldn't know that.

Q. Do you know what the volume of business as of the casein division in this building? A. Not offhand. I would have to look up the records. We wouldn't have any way of telling that. 57

Q. Does the casein division have any other offices outside of this building? A. In Seattle and in Bainbridge.

Q. Those offices would be factory offices? A. Yes, and selling organizations.

Q. The office here would be the centralized selling office? A. Yes, this is the main office.

Q. Do instructions to the casein departments outside of this office emanate from this office—running instructions, sales, price policy? A. Price policy, yes.

58 *Plaintiffs' Exhibit 1—Deposition of Wyman.*

Q. Manufacturing instructions? A. Yes.

Q. Does the casein office here have anything to do with the purchase of raw materials for the factories at Bainbridge and Seattle? A. Yes.

Q. Does the casein office in this building have anything to do with the distribution of the products on a nation wide basis or an international basis? A. Yes.

Q. To what extent? A. To the extent of the location of the purchaser as to allocation of orders.

Q. If the sale is made to a new customer who had never been on the Borden books before, where is his credit standing passed upon? A. Here is New York.

59 Q. So that every order comes through New York, no matter where it originates? A. That is right. I will clarify that in this way: We might give a maximum credit allowance to a new customer. We would tell our man in Seattle that we had to look the customer up, and if his credit were all right, we would extend credit.

Q. Who is in charge of the casein division in this building? A. William Callan.

Q. What position does he have with the Borden Company? A. Vice-President.

Q. What percentage of the entire Borden business is the casein division? A. I don't know.

Q. Is it substantial? A. I really couldn't tell you. I couldn't even guess.

Q. Does the casein division in this building do any 60 billing? A. Yes.

Q. Do you do all the billing for the casein products regular business as well as new business? A. I am not quite sure whether we do the billing for Seattle. I think they do their own billing.

Q. How is the billing done—is it done at regular intervals? A. The billing is done subsequent to the date of shipment, at the New York office.

Q. Pursuant to what? A. Pursuant to order received by the New York office from the factory.

Q. At the instruction or direction of the factory after the shipment is made? A. Yes.

Q. Only pursuant to information that this office receives from the factory? A. That is right.

Q. I say factory, because you mentioned that the Seattle office does its own billing? A. That is right.

Q. Isn't it customary for an invoice to be sent to the customer at about the same time that a shipment is made? A. Yes, sir.

Q. Who sends out that? A. The New York office.

Q. Are shipments made from the factories of the casein division across state lines? A. Yes.

Q. Is there any other phase of the casein division that we have not touched upon, that you can recall? I mean, of course, in this building. A. I don't know of any other activity.

Q. Is the advertising for the casein products done in this particular building? A. Yes. That is, it originates in this building.

Q. Is the copy for the advertising written here, too? A. I would say no.

Q. Is it drafted here? A. Yes.

Q. Who writes the copy for the casein division? A. An independent advertising agency.

Q. Is the advertising placed from the office of the casein division in this building? A. Yes.

Q. Who does the drafting of the advertising? A. The president of the casein division, Mr. Callan.

Q. Is the draft copy sent from this building directly to the publications or does it go back to the agency? A. It goes back to the agency.

Q. What is the set-up of the Borden store on the second floor of this building? A. It is an accommodation store for the employees and the tenants of the building.

64 *Plaintiffs' Exhibit 1—Deposition of Wyman.*

Q. Does the Borden Company run the store? A. Yes.

Q. Who is in charge of the store? A. I am.

Q. What products are sold there? A. Milk, hemo, butter and cheese, caramels, malted milk, generally.

Q. Are any products ever shipped from New York State to other states? A. No.

Q. Is it an accommodation only to the employees of the Borden Company in the building? A. Yes.

Q. Where are these products obtained? A. The fluid milk would come from our division of the Borden Company downtown; eggs would come from there; condensed and evaporated milk, cheese, would come from the warehouse on 28th
65 Street.

Q. Do any of these products come from other states to this store in the building? A. They could.

Q. Do any of your plants or factories ship products directly to the company store in this building? A. Offhand, I would say no. We get our entire supply from our warehouse in New York.

Q. Do you know whether any of the products that emanate from the warehouse in New York come from other states? A. Yes.

Q. How many employees are there in the company store? A. Two.

Q. Where is the store? A. In the club room.

Q. Do the maintenance people in premises 350 Madison Avenue have anything to do with the operation of that
66 store? A. No.

Q. Do they clean the premises, in addition to their duties about the building? A. They clean the club room in which the store is located.

Q. Are there any particular maintenance men who have that job? A. I don't care to answer, because I am not sure.

Q. Does the casein division have its own mailing department? A. No.

Q. Who takes care of the mailing? A. Our mail room on the sixth floor.

Q. What are the activities of the Borden Company on the third floor, which you have not mentioned? A. There is the national milk sugar division.

Q. What is that, and what do they do? A. They take the sugar out of skim-milk and make a lactose of it.

Q. Where do they do this? A. At the factories, Penalville, New York, and Bainbridge.

Q. What are the products used for? A. Infant feeding.

Q. Who is in charge of that division? A. Mr. Callan.

Q. Are the activities of the national milk sugar division conducted on the same basis as the casein division, or are there any differences in the operation? A. In general, the same. You have such a dissimilar product that it is not comparable. 68

Q. In other words, orders are received here as a result of advertising prepared here, instructions are sent from the factories to ship products across state lines, and after the products have been shipped and the factory has advised the home office, bills are sent from this office. Is that correct? A. Yes.

Q. Where are payments of bills sent by customers in both casein and milk? A. To this office.

Q. Could you mention some of the consumers of this product? Is the business primarily done with consumers or intermediaries? A. With intermediaries.

Q. To whom do you sell? A. Druggists. 69

Q. As in the case of the casein division, the factories are instructed from this office as to production, procedure, distribution and other matters? A. Yes.

Q. Are there any other activities of the Borden Company on the third floor? A. Traffic.

Q. Will you please explain what these activities are? A. The direction of shipments from the factories to their given location.

Q. Who directs these shipments? A. The traffic manager.

Q. Who is he? A. Ernest T. Hadley.

Q. What is his position with the Borden Company? A. Traffic manager.

Q. Does he occupy any office? A. No, sir.

Q. From what divisions does he receive directions or instructions? A. It emanates from the sales department.

Q. The sales departments of what particular division of the Borden Company? A. From the manufactured products division. We have one over-all company known as the Manufactured Products Division which comprehends casein, national milk sugar and the old Borden Condensed Milk
71 Company. They are, in basis, a separate division. They have their own billing department, accounts receivable, property records, etc.

Q. It covers those four divisions that you mentioned before? A. Yes.

Q. The manufacturing division gives instructions to the traffic manager as to the shipments of these products? A. No, the traffic manager gives instructions to the factories as to how the shipments should go forward.

Q. Will you please explain that in a little greater detail? A. If there is no deviation from regular customers' shipments, the factory has previously received traffic instructions as to the carrier that is to receive the shipment. In the event that a factory's production should change to the manufacture of a different product, traffic instructions as
72 to the routing of the new product will be issued by the traffic department in this building.

Q. Where are these factories located? A. Throughout the United states.

Q. Are these products which are directed to be sent by the traffic manager, sent across state lines? A. You mean the orders? Yes.

Q. Where do these original instructions issue from? A. What instructions?

Q. I assume that a superintendent would ask the traffic manager for instructions as to how to ship merchandise to a new customer. A. That is all routed right here in this office, and appears on the invoices. The original invoice goes to the factory, and on the customer's copy of the original, and subsequent carbon copy, the routing is shown right on the invoice. There is nothing to ask. The superintendent gets it, turns it over to his shipping clerk, it is packed and put on the car of the carrier.

Q. You are talking now of the regular business of directing shipments from this office building? A. Yes.

Q. You mentioned something about new business, where the superintendent of the plant might not know how to ship merchandise to the customer. I am interested in that operation. A. I have answered your second question first, you recall I said that the factories had a defined schedule as to routings on regular orders received, other than from New York.

Q. That would cover new York, too, wouldn't it? A. No, not necessarily. I will tell you why. We have given some of our brokers throughout the country permission to send an order direct to the factory, and the factory has been so notified, and then they have been given a predetermined routing for those orders coming from a certain broker in a certain location.

Q. Those original instructions which are followed by the factory superintendents in the ordinary case, where do they originate from in the first place? A. Madison Avenue.

Q. Another function of the traffic manager is to study freight rates to determine the speediest and most economical method of shipment, and those determine the instructions which he offers to the factory superintendents? A. Yes.

Q. Does the traffic manager check, or does somebody in his division in this building check the various outlines for cost of shipment, that is, freight rates on each shipment. A. Yes.

Q. How many people are employed in this division? A. Maybe 15; I don't know exactly.

Q. What products are covered by the activities of the traffic manager in this building, or affected by the operations of the traffic manager in this building? A. Malted milk, caramels, hemo, casein, milk sugar, mincemeat, condensed and evaporated milk, and prescription foods.

Q. Are these products manufactured in states other than the State of New York? A. Mincemeat, no; milk sugar, no. Those are the only two that are New York State.

Q. Are these products shipped across state lines in substantial amount? A. Yes.

77 Q. What other activities are there on the third floor of this building? A. Telephone and switchboard.

Q. Will you please tell us what this switchboard is for? A. It is for incoming and outgoing calls.

Q. Is that part of the Borden telephonic system in this building? A. We have an inter-office communicating system.

Q. When the Borden Company desires to communicate with its factories all over the nation, does it make its calls through its central switchboard that you have on the third floor? A. In the majority of cases, yes.

Q. Do you have any direct wires to your factories all over the nation on this switchboard, or is it separate? A. There are direct wires from 350 Madison Avenue to the various factories, through the medium of teletype machines 78 located on the 7th floor, Manufacturing Department; 4th floor, Export Department; 15th floor, Special Products Department.

Q. It doesn't clear through that master switchboard, is that correct? A. Yes.

Q. There are no direct wires running from the Borden office in this building to factories, that clear this particular switchboard? A. Yes.

Q. Is there any other activity of the Borden Company on the third floor that you have not mentioned? A. No.

Q. What are the activities of the Borden Company on the fourth and fifth floors of this building? A. Sales activities.

Q. In connection with what are these sales activities done? A. Sales of manufactured products.

Q. What manufactured products do you have in mind? A. Condensed, evaporated and malted milk, hemo, caramels and mincemeat.

Q. What does the sales division do on the fourth and fifth floors? A. It is the sales department.

Q. What is the nature of the sales work that they do? 80
A. The direction of district sales managers and district salesmen, receiving of orders for sales from customers for shipment.

Q. Who are these customers? A. Generally, wholesalers.

Q. Where are they? A. Throughout the United States.

Q. How are the sales operations conducted from this building by your sales office on the fourth and fifth floors? A. An order will come in to the sales department. It is then invoiced to the customer and sent to a designated factory for shipment.

Q. I would like to know the other functions of the sales division. Does it have anything to do with the advertising of the Borden products? A. Yes.

Q. What does it do? A. They handle the advertising of 81
condensed, evaporated, malted, milk sugar and mincemeat.

Q. When you say handle, does copy for advertising originate from those offices? A. In some cases.

Q. Do you have a copywriting staff there? A. I might put it this way, that we have a layout staff.

Q. Who does the approval of the layouts? A. The general sales manager.

Q. What is his name? A. Arthur W. Ramsdell.

Q. Is he an officer of the Borden Company? A. He is vice-president.

Q. Does he employ all the salesmen for the company? A. No.

Q. Where are these advertisements placed after they are approved by Mr. Ramsdell? A. In magazines and periodicals.

Q. What type of advertising is done by this division? A. Primarily, approval of newspaper advertising in defined locations throughout the United States. Also, the working up of an advertising expenditure budget.

Q. Who takes care of the advertising budgets—Mr.
83 Ramsdell? A. Yes.

Q. Do these advertisements contemplate shipments across state lines from your factories and plants, wherever they may be situated? A. Yes.

Q. What other advertising emanates from the fourth or fifth floors in this building? A. The national Elsie advertising campaign.

Q. From whom does it emanate? A. Under the supervision of Mr. Arthur W. Ramsdell.

Q. Are all ideas and thoughts with regard to the Elsie advertising his exclusively? A. Substantially, yes.

Q. Does he prepare the layouts for that advertising in this building? A. Under his supervision.

Q. Are the layouts made here? A. I wouldn't want to
84 answer that surely. I don't know.

Q. In connection with the local campaigns in different parts of the country, are the layouts and the mats prepared here and shipped? A. I don't know.

Q. Who handles the Elsie advertising? A. An independent advertising agency outside of the building.

Q. This Elsie advertising covers many of the Borden products, is that correct? A. Full line products of the Borden Company. Full line products cover all products mentioned before, with the exception of casein and milk sugar.

Q. What other activities does the sales department engage in, in addition to this advertising work? A. The introduction and pushing of full line products and new products.

Q. How is this done? A. By means of campaigns.

Q. What are the media of salesmanship used for the Borden products? A. Campaigns for new products, salesmen contacting the trade for orders.

Q. What part of this function does the sales office or offices in this building serve? A. They have supervision over the number of salesmen in a given district, and approval is also given from this office as to any increase or decrease in the sales staff of a particular district. 86

Q. Where are these sales districts that are under the supervision of this office in this building? A. Throughout the United States.

Q. Are these district managers under the direct supervision and control of the sales division in this building? A. Yes. Under the general sales manager.

Q. How large a staff do you have in connection with your sales division in this building, approximately? A. I don't know, exactly.

Q. Does the sales division in this building plan and decide upon the various types of campaigns to be used and the various parts of the country in which those should be done? A. Yes.

Q. In connection with such campaigns, as well as general advertising, you use local and nation-wide publications and radio? A. No radio. We might use the radio in the west. We haven't in the east. 87

Q. Have you had any radio campaigns, to your knowledge, since October 24, 1938? A. No.

Q. Where are the brochures and campaigns material or sales material prepared? A. In this office.

Q. Do you have a printing office in this building for the preparation of the material? A. No. When you say in this

office, what do you mean by that? The thought is created in this office. The actual production is done outside of this office.

Q. Are layouts and copy prepared by the sales division here for such material? A. I am not entirely sure.

Q. When you say prepared, you only had in mind the thoughts and ideas in connection with the sales campaigns? A. The thought is created here.

Q. You do not know where the printing is done for the material thought up here? A. No.

Q. After the advertising matter, brochures, etc. are printed, are they returned to this office for mailing throughout the country? A. No, it goes direct from the printers, subject to orders sent from here, to where they are wanted.

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Q. Who pays for the printing? A. The Borden Company, from the offices here.

Q. As to the man power for selling purposes, is this the correct description of the structure of your selling department: You have a general sales manager located at 350 Madison Avenue; he appoints the district sales managers and they, in turn, employ the local salesmen? A. Yes.

Q. Do you have any salesmen operating from the offices in this building? A. Yes.

Q. What area do they operate? A. The metropolitan area.

Q. This metropolitan area includes the State of New Jersey as well as the State of Connecticut? A. Yes.

90

Q. How do they operate out of this building? A. They go to consumers and wholesalers, anyone they can sell to. The salesmen operating out of this office are very nominal. I don't think we have very many. We have a district office right here in New York, downtown, which operates independently, the same as Philadelphia, Boston or Detroit.

Q. And you do have salesmen on special items? A. Yes, but they will not cross state lines.

Q. Would these men have anything to do with sales consummated over state lines? A. No.

Q. Would any order come from the States of Jersey or Connecticut to these offices in the Borden Building, at 350 Madison Avenue? A. No.

Q. When these salesmen go to Brooklyn or some borough in the City of New York to sell Borden products, do any of these sales that they consummate in those boroughs contemplate shipment of Borden products over state lines? A. Yes.

Q. To what extent? A. It would be very hard to say. We might have a shipment come direct from one of our factories, across state lines, to one of the A. & P. stores, 92
or we might have that entire shipment from the factory go to the warehouse of the A. & P. over in Jersey City, and they in turn would make their own deliveries to the stores, according to their own requirements.

Q. These shipments that would be made across state lines would be a result of these orders that might be obtained by these salesmen operating from this building? A. Yes, but not the big business; that would come right into this office here.

Q. But a regular business would be done pursuant to that arrangement? A. Yes.

Q. Wouldn't your local salesmen make periodic calls on, say, Seeman Brothers, or Williams or Liggett? A. No, they would come here. They might call about a new prod- 93
uct, but that would be very seldom.

Q. In connection with casein, you said that it was quite common for you to advertise nationally and suggest that people write to this office and request samples. Is that done with other products as well as with casein? A. It might be with a new product.

Q. In your advertisements in trade papers and other periodicals, do you request that orders be sent to this office? A. Yes.

Q. As a result of such advertisements, you receive orders which result in this office directing that shipments be made across state lines? A. Yes.

Q. What activities do you have in connection with your cheese products? A. It is practically the same as on the full line products.

Q. What differences are there in the sales functions of your offices here in connection with your full line products and your cheese products? A. They are substantially the same except in the local advertising end.

Q. In what respects? A. We do not advertise.

Q. Do you have special salesmen for your cheese? A.
95 Yes.

Q. Do they operate out of this office? A. No, they operate through a district.

Q. Under the supervision and control of whom, in this building? A. C. A. Echburg.

Q. What is his connection with the sale of cheese products? A. He is the general sales manager.

Q. Is he also an officer of the Borden Company? A. No.

Q. A director? A. No. He is president of the Borden Cheese Company Division.

Q. Does he have a staff under him in this building? A. Yes.

Q. What do they do in connection with the sale of cheese? A. The same as in the full line.

96 Q. What other activities does the sales division in this building participate in? A. Billing of the customer's order, which is then mailed to the factory for shipment covering full line products. With respect to the cheese operation, the shipment is made direct from the branch to the customer, and shipping instructions are forwarded to this office showing quantities and price, which is then invoiced to the customer.

Q. Do these shipments cross state lines? A. Yes.

Q. Have we covered all the activities of the sales department on the fourth and fifth floors in this building? A. All except export.

Q. Will you please discuss that for us? A. We get an export order and make the shipment.

Q. Where do these export orders come from? A. Panama, Venezuela, Peru, United Kingdom.

Q. Do all the export orders come directly to this office? A. Yes, to the export department.

Q. Pursuant to what? A. Pursuant to various foreign customers.

Q. How are those customers obtained? A. Through brokers in those foreign countries. 98

Q. Do you advertise in foreign countries? A. Yes. It is prepared and directed in this office.

Q. Are mats for foreign advertising shipped from here? A. No.

Q. Do orders for foreign shipments ever go directly from a foreign country to the factory? A. Never.

Q. They go exclusively to this office, and this office directs factories to make shipments to foreign countries, is that so? A. Yes. Invoices are prepared here.

Q. Are payments then sent to the main office in this building? A. Yes. All of the foregoing with reference to foreign shipments is subject to this qualification: Since some time subsequent to October 24, 1938, any orders for shipments to places in the sterling area, which in general 99 is the British Empire, are referred to our wholly owned Canadian subsidiary, and payment is then made to Canada.

Q. What commodities are exported? A. All products.

Q. Have you any idea of the volume of export business? A. I have not. The export sales to countries not in the sterling area fluctuates from month to month and would say that I do not consider it substantial as compared with the total sales dollar value of the Manufactured Products

Division or as compared to the consolidated sales of The Borden Company.

(Examination adjourned to April 30, 1943, at 2 P. M., at the same place.)

Examination continued pursuant to adjournment.

DIRECT TESTIMONY:

Q. Is copy for advertising written here and are layouts for such advertisements prepared here? A. Partially.

Q. Will you please explain? A. The layouts in connec-
101 tion with window displays, counter displays, also suggested ideas as to the national Elsie advertising program.

Q. The layouts are prepared here? A. In the rough.

Q. Where are they sent from here? A. To commercial artists.

Q. In New York City, or across state lines? A. I am not sure about that. I would say in the City.

Q. After these layouts are used for printing purposes, what happens to those layouts? A. They are retained by the printer.

Q. The printed material is used where? A. The window displays would be used in different groceries and super markets; counter displays, the same, and window strips. In general advertising of that type of material and the
102 Elsie campaign advertising, the finished cut would go to the periodical that had national distribution, as the Saturday Evening Post, Liberty, Collier's.

Q. Would any of the printed material that you refer to cross state lines? A. Yes.

Q. They would be distributed on a nationwide basis? A. Which are you referring to?

Q. I am talking about window displays. A. Yes.

Q. And all the printed materials that you mentioned would be sent pursuant to instructions issuing from Mr. Ramsdell of this office? A. Yes.

Q. Will you state how advertisements for local newspapers in various parts of the country are prepared? A. They are prepared by the store in which the sales program of our product is instituted. In other words, John Jones in Omaha is going to run a sale on evaporated or hemo. We work that on a cooperative advertising basis, whereby we will send him advertising material such as window displays, counter pieces, window strips. A salesman will be allocated to that particular store, and possibly a demonstrator, if a demonstrator is necessary. He inserts 104
the advertisement in his local newspaper or periodical in any manner that he sees fit, pays for it himself, but in the cooperative advertising end of it, to compensate him for his expense, we allow him so much a case, pound or stipulated price on the unit, based on a contractual agreement with him for a specified period.

Q. Are suggested texts and layouts for local advertising sent from here to the local store manager? A. No. As I stated, that is a creation of his own mind; how he wants to put it, where, and so on.

Q. What would be the operation under the following circumstances: Let us assume that a chain of grocery stores is opened in the State of Nevada, and they want to handle the Borden products and plug them. What would they 105
do? Would they write to Mr. Ramsdell's department in New York? A. All of the campaign work would emanate from the New York office and would be under the direction, supervision and control of Mr. Ramsdell's department in this building.

Q. In connection with advertisements appearing in local newspapers over the nation, would mats and layouts be sent from this office to the newspapers in which these advertisements are to appear? A. No, sir.

Q. How would it work out? A. Just as I outlined the one case before. We do not nationally advertise in newspapers. That advertising would be created in the local areas.

Q. Assuming that certain advertising copy has been approved by Mr. Ramsdell's department and the Borden Company, through Mr. Ramsdell's department, had decided to make a campaign in a district outside of New York State, wouldn't Mr. Ramsdell's department arrange to have a supply of that advertising material sent to that district and kept in storage to be used as required? A. Yes, sir.

107 Q. Is all printing done at the direction of Mr. Ramsdell in the home office here? A. I will confine that to the full line products division.

Q. With reference to the other products, who would direct and supervise the printing of the advertising material? A. What other products do you have in mind now?

Q. Full line products. A. Full line would be Mr. Ramsdell.

Q. But you said before all manufactured products. A. All full line products.

Q. What are the activities of the legal department of the Borden Company on the fifth floor of this building, generally? A. If a legal question comes up for discussion, it is taken immediately to the Borden Company legal de-
108 partment, and they in turn will either render a decision direct to us or consult general counsel, Milbank, Tweed and Hope.

Q. What other work is done by that legal division? A. The Borden Company legal department is broken down to three departments: One, general, which gets general matters in connection with legal matters; second, workmen's compensation cases, which are handled by all of the Borden

Company divisions or affiliates, and the public liability cases.

Q. Are the employees of the legal division employees of an independent law firm, or the Borden Company? A. The Borden Company.

Q. Are any opinions or decisions written by the legal department in this building for use in states other than the State of New York? A. Yes.

Q. Do the factories and plants of the Borden Company write in for legal interpretations in connection with the operation of their business plants in states other than the State of New York? A. Yes.

Q. Is this a regular course of business that is con- 110
ducted in the legal division of the Borden Company? A. Yes.

Q. Are these opinions shipped across state lines? A. Yes.

Q. Would these advisory opinions and decisions be used for any particular area in the United States or used over the entire nation? A. They would be used in a particular area, because you might not have the same type of question.

Q. Their work covers area all over the nation? A. That is right.

Q. Will you please tell us what the activities of the Borden Company are on the sixth floor of this building? A. There is the mailing department and accounts receivable department, and the cashier's department. Those depart- 111
ments, I think, are self-explanatory.

Q. I would like to find out what the mechanics are. What does the cashier's department do? Where are the receipts collected from? A. From the customer.

Q. Does a customer come into the building to pay bills? A. Through the medium of checks, money orders, drafts.

Q. For what departments? A. Sales made by the manufactured products division.

Q. Do customers appear in person to pay bills? A. I said through checks, money orders or drafts.

Q. Are these checks, money orders and drafts sent across state lines to the Borden offices in this building? A. A great many of them are.

Q. Are these checks, drafts and money orders sent pursuant to sales made across state lines? A. Yes.

Q. Who is in charge of the cashier's office? A. C. C. Turner.

Q. What is his connection with the Borden Company? A. Cashier.

Q. Is he an officer of the company? A. No.

113 Q. Is the cashier's office in this building the only place where payments can be made to the Borden Company as a result of sales made by the Borden Company elsewhere? A. Checks are sent to this office exclusively, with the exception of isolated cases.

Q. Where are checks sent for other products of the Borden Company? A. To the location where the home office is.

Q. Are you selling any articles out of 350 Madison Avenue which do not come under the manufactured products division? A. Yes, cheese.

Q. Payments for those sales are made to the Borden Company at 350 Madison Avenue? A. Yes, there is one exception to that which is very minor. The Chicago office of the Borden Cheese Company will not remit to 350 Madi-

114 son Avenue. They have their own accounts receivable out there and make their own collections.

Q. Do invoices for manufactured products and cheese products of the Borden Company, which are sent out from the offices of the Borden Company at 350 Madison Avenue, contain notices that remittances should be sent to the cashier's office in this building? A. Remittances are to be made to 350 Madison Avenue, and then they just find their way to the cashier's office.

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Q. Does the cashier's division or department of the Borden Company do anything else besides sent out invoices and collect remittances which are sent to it from sources outside? A. They do not sent out invoices. They are a collection agency only.

Q. They do not do anything else in that particular office? A. No.

Q. What are the activities of the credit department of the Borden Company at 350 Madison Avenue? A. The passing on credit for orders received for shipment, and also to the keeping of the records of the accounts receivable.

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Q. Do they have any investigators attached to that office? A. No.

Q. How do they operate? A. We have our own records. We consult the Dun & Bradstreet book.

Q. From where do they get their requests for credit standing of customers? A. The sales department and representative in this building.

Q. And do they send any of these credit reports across state lines? A. Yes.

Q. In any particular locality, or over the nation? A. All over the nation.

Q. Do they get any requests for credit reports from brokers or Borden representatives in states other than New York State? A. Yes.

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Q. And credit reports are then forwarded to these people that request the investigations? A. Yes.

Q. Isn't it true, Mr. Wyman, that no sale is affected anywhere in the country except that it is subject to the credit department in New York? A. Yes, sir.

Q. Are there any other activities of the credit department that you have not mentioned? A. No.

Q. Who is in charge of the credit department? A. C. E. Craneh.

Q. Is he an officer of the Borden Company? A. No.

Q. What are the activities of the label department of the Borden Company on the sixth floor? A. The passing on the suggested labels for various products, as to size and contents.

Q. Are layouts made or mats made for these labels that are thought out by the label department? A. No.

Q. Isn't it true that your products come under the Pure Food and Drug Act and your labels must conform to the federal statute? A. Yes, sir.

Q. Is the copy for those labels written by the people in the label department? A. No.

119 Q. Who writes the copy for the labels? A. Various affiliated divisions of the Borden Company.

Q. Are these labels sent across state lines from the home office at 350 Madison Avenue? A. Yes.

Q. The label department's chief function is to pass upon the design or contents of the label and to obtain a legal opinion of those labels? A. I would answer that in this way—the label department is a clearing house for all labels.

Q. And no label is ever printed unless the person responsible for that label gets the approval of the person in charge of the label department at the home office? A. That is right.

Q. Who is in charge of the label department at the home office? A. Nominal charge is E. C. Thompson. Actually, the passing on the labels is through a committee.

120 Q. Who are members of this committee? A. I don't know that.

Q. Are these labels corrected or changed by members of the label department, or are they simply approved or not approved? A. They are changed as far as ingredients are concerned.

Q. Do any of these labels originate from any of the divisions of the Borden Company in this building? A. Yes.

The manufactured products division in this building may originate ideas for labels and draft those labels and send them up to the label department for final approval.

Q. Are any of these labels sent across state lines to your various plants and factories scattered all over the nation? A. The finished label, yes.

Q. Where are these finished labels prepared? A. At the printer's.

Q. Where would he be? A. He might be all over the country.

Q. So that after a sample label is designed in one of the various departments in the building, it is then sent to the label department on the sixth floor for approval, checked by the legal department, and then the label will be sent from here, across state lines, to a printer who will prepare it for use in connection with a product? A. Yes.

Q. Would these labels be affixed to your products? A. Yes.

Q. And the products would be sold across state lines? A. Yes, sir.

Q. Is there any other activity of the label department which you haven't mentioned? A. Not that I know of.

Q. Does the Borden Company have its own mail department on the sixth floor of this building? A. Yes.

Q. What is mailed from that department? A. Correspondence.

Q. To whom? A. To various factories, individuals, customers, brokers.

Q. Are any commodities mailed from that mail room to places outside the State of New York? A. Occasionally.

Q. What products would be sent across state lines through the mails from this building? A. That is problematical. It might be any product, as a sample.

Q. What samples would be sent from this building to places outside of the state? A. A sample of condensed milk.

Q. Would this be a regular practice? A. No, sir, it would not, it would be extreme.

Q. Would these samples be sent to customers outside of the state? A. They might be a sample or a replacement to a complaint.

Q. Under what other circumstances would samples or commodities of the Borden Company be sent from this building to places outside the state? A. Only under these circumstances.

Q. Are orders ever taken as a result of these samples that are sent out from the home office at 350 Madison Avenue? A. Yes.

125 Q. Would that be a substantial part of the business of the Borden Company in this building? A. No.

Q. The orders taken pursuant to the samples sent from the premises are negligible? A. Yes.

Q. Does your mailing department handle all incoming mail as well as outgoing mail, and attends to its distribution? A. Yes.

Q. Does all outgoing mail from the various departments of the building go through the mailing department? A. Substantially. In the ordinary course of business all mail would go through the mail room.

Q. How does it get from the various divisions to the mail room? A. By messenger.

Q. How do those messengers travel? A. Both by stairs and elevators.

126 Q. What means are used for the distribution of incoming mail? A. Through messenger service. They use either the stairs or elevators.

Q. Are any commodities received from outside sources by the mail department in this building? Do your factories send their products to the mail room here? A. Yes.

Q. Is that regularly done? A. In particular cases, yes.

Q. What cases do you have in mind? A. In connection with defects which may appear in the packaging of Borden

products, samples of Borden products would be forwarded to the home office here so that we could examine the products for explanation of the defects.

Q. Would any other commodities be sent to this office building? A. No.

Q. Would these alleged defective packaged Borden products be sent across state lines? A. Yes.

Q. What other functions does the mail department render for the Borden Company here? A. Messenger service.

Q. For the purpose of collecting mail and distributing mail? A. Not only mail. More in the form of an office boy, inter-office communication, etc.

Q. What means of travel between offices do the messen- 128
gers use? A. Stairs and elevators.

Q. They would render services throughout the building, is that correct? A. That is right.

Q. Who is in charge of the mail room? A. Nominal head would be G. M. Van Valkenburgh.

Q. Is he an officer of the Borden Company? A. No.

Q. What are the activities of the manufacturing department of the Borden Company on the seventh floor? A. Supervision of running instructions for the manufactured products, exclusive of casein and milk sugar.

Q. Where are these running instructions sent to? A. Various factory locations throughout the United States.

Q. Do these factories make commodities for the Borden Company for shipment across state lines? A. Yes.

Q. To what extent are the superintendents of the indi- 129
vidual factories allowed to exercise their own judgment, and to what extent, in general, are they controlled from the manufacturing department on the seventh floor in this building? A. They are entirely controlled by the manufacturing department.

Q. Could you give us some details as to the directions which are sent out from the seventh floor? A. The manufacturing department receives advice from the various factories as to the pounds of milk received daily. If the supply

130 *Plaintiffs' Exhibit 1—Deposition of Wyman.*

of milk is inadequate for economical operation, the manufacturing department will issue instructions to some other factory to divert their milk to the manufacturing plant, or will change running instructions of this plant from either condensed to evaporated or some other manufactured product which the factory is qualified to run.

Q. In other words, the manufacturing department on the seventh floor instructs the various factories throughout the country when they should increase production, when they should decrease production, and when they should change the form of production? A. That is right.

Q. And it also controls the supply of raw material for
131 each plant? A. Yes.

Q. In other words, the manufacturing department in this building is the pulse of the supply and demand condition of the individual factories and plants of the Borden Company throughout the United States? A. Yes.

Q. Would these products from these factories be sent across state lines as a result of the direction and control exercised by the manufacturing division in this building? A. Yes.

Q. Would the superintendents of these individual plants and factories of the Borden Company inquire of the manufacturing division in the Borden Building as to their instructions in operating and supervising their respective plants and factories? A. Yes.

Q. What particular inquiries would be made by the superintendents of these individual plants and factories? Would they inquire of this division in connection with equipment at the plants, repairs, labor situation? A. Yes.

Q. What other things would they get in touch with this department for? A. Purchase of trucks and automobiles, plant expansion.

Q. Would the orders for construction of increased facilities be placed through the manufacturing division? A. Yes.

Q. No one of these superintendents of the plants and factories that we have mentioned would have independent discretion as to any of these activities that you mentioned? A. Only in the regular course of business. For plant expansion or new equipment, no.

Q. They would have to get direction and approval from the manufacturing division in New York? A. Yes.

Q. Does the manufacturing division in New York employ the top manufacturing personnel of the various plants? A. They are appointed by the manufacturing department.

Q. Who would be in charge of the letting of contracts for various business matters which might arise in connection with the operation of these individual plants and factories scattered all over the nation? 134 A. They would have to get approval from the New York office.

Q. What about the budgets of these plants and factories which would be under the direct control of the manufacturing division in this building? A. The budgets are all set by the manufacturing department through audits from the individual factory superintendents as to their requirements.

Q. Would the manufacturing division in this building send any one out to inspect the plants and to examine the plant from an efficiency standard? A. Yes.

Q. Do you maintain a staff of efficiency experts in this building for that purpose? A. We maintain engineers.

Q. How large is that staff? A. We have two engineers.

Q. The business of these engineers would be to examine 135 the plants scattered all over the nation and render reports to the manufacturing division of the home office? A. That is right.

Q. In connection with financing for expansion work, is any financing arranged outside of the home office by these supervisors at the plants? A. No.

Q. All bills would be paid from the home office for expenditures like expansion and purchase of trucks? A. Not all.

Q. Who would pay for those things? A. It all depends on the type of expenditure. Labor would be paid by the factory. Equipment, particularly heavy equipment, would be paid by the New York office. It would be the New York office that would make the contract with the manufacturing concern of the piece of equipment.

Q. Are negotiations for the purchase of equipment handled in this office? A. That should be qualified as to type. Heavy equipment would be handled here.

Q. Does the manufacturing division have any other function beside those that you have mentioned? A. They are in charge of tin shops and machine shops where tin cans
137 are manufactured.

Q. They have supervision over manufacture of your receptacles? A. That is right. We manufacture our own tin cans. They control the size, quantity and production of tin receptacles for Borden products.

Q. What are some of the commodities manufactured by the Borden Company in its plants and factories all over the nation, over which direct control and supervision is exercised from the office at 350 Madison Avenue? A. Vitamin concentrates, casein, cheese, production of fluid milk, cream, butter; we handle eggs, sardines and canned fish, fresh fish, livers, poultry, feed, animal food. I think those are the principal products. Also orange and lemon powder, dehydrated soups and powdered coffee.

138 Q. Do you do your own canning of sardines? A. Yes, in San Francisco.

Q. Is that controlled from this office? A. Yes.

Q. To the same extent that the manufacturing division controls the various products you just described? A. No, because that is a seasonal operation. There are no running instructions there other than the size of the can and the flavor of the sardines.

Q. Is there anything else that you have not mentioned about the activities of the manufacturing division? A. We

have covered the running instructions, the engineering staff and the tin shops and machine shops.

Q. Are new methods of manufacture determined in this building? A. Yes.

Q. When those methods are developed and approved by the people in this building, are instructions to use the new methods sent out to all the factories? A. Yes.

Q. What are the activities of the accounting department on the eighth floor? A. The eighth floor is broken down into three departments. There is the bank reconciliation division. I think that speaks for itself.

Q. What banks are you referring to, the local banks or banks wherever the Borden Company has accounts? A. 140
Nationwide.

Q. Every time a factory superintendent in Oshkosh draws a check, do you get a record of that here? A. Yes, every single check.

Q. Are duplicate statements furnished this office of banking activities of a factory in a state other than the State of New York? A. The original record comes here and the duplicate is retained by the superintendent of the factory or plant.

Q. Bank vouchers are sent to the New York office, together with the original bank statement? A. That is right.

Q. These bank statements and cancelled vouchers are forwarded to the home office by the individual factory superintendents? A. That is right.

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Q. Does the accounting department only receive these banking statements and cancelled vouchers or does it do anything after receipt of those things? Does it send back any reports to the superintendents of these plants? A. If there are any errors we write back, or if there has been no endorsement.

Q. In other words, the accounting division supervises the control over the deposits of the individual plants and factories? A. That is right.

Q. Do you receive the same information as to every petty cash payment of the various factories? A. Yes.

Q. Does the bank reconciliation division of your accounting department do any other things beside the activities you just mentioned? A. No.

Q. What is the next division of your accounting department? A. Cost.

Q. What, in detail, are the activities of the cost division of your accounting department? A. The collection of different expenditures made, and arriving at the individual factory cost of a product manufactured.

Q. Are men sent out in the field to gather these statistics
143 and figures which you require? A. No, the factory sends it all in.

Q. On the basis of these reports, costs are computed for the different commodities of the Borden Company? A. Yes.

Q. On the basis of these cost figures, what is done? A. We retain them here.

Q. What uses are made of the results of the work of the cost division of the accounting department? A. The general accounting department.

Q. From there, where are they sent or used? A. In arriving at an income profit and loss statement.

Q. Are the results of this cost accounting method ever used in reaching decisions to discontinue the manufacture
144 of a certain product or change the method of production of a product? A. Yes, infrequently, but it is a determining factor.

Q. Are the results of this study used sometimes in increasing the production of a particular article? A. Yes.

Q. What divisions of the Borden Company use these cost analyses which are prepared by the accounting division? A. Manufactured products and cheese.

Q. What divisions of that department rely on these cost analyses? A. Sales department.

Q. What about the purchasing department, would they have anything to do with these cost computations? A. That would be more or less fixed. We know what the manufacturing cost will be.

Q. Before a new product is manufactured, does the cost accounting department estimate the cost of producing such article? A. They assist other people in this building in such work.

Q. Does the cost division of your accounting department impose the method of figuring costs in the various factories? A. We do all that here. The method is devised here.

Q. What else does the accounting department do? A. 146
The disbursing division.

Q. What exactly do they do? A. Pay all bills, invoices; they pay brokers' commissions based on sales of sales representatives; make payments on any contracts we have entered into; they keep track of and distribute factory disbursements; they check the factories' report against the materials record to see if the goods have been received and paid for. That covers the whole scope.

Q. And this disbursement division of the accounting department would cover all the factories and plants of the Borden Company throughout the nation? A. Yes, the manufactured products division.

Q. Do they also supervise the inventories of the factories? A. No, sir.

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Q. Who does that? A. The stock department does that.

Q. Please explain the activities of the accounting department in connection with the checking of factory receipts of materials and other things which affect the individual factories and plants. A. As an illustration—if a factory had three carloads of coal come in, 250 tons per car, we would get a receiving report acknowledging receipt of that coal by the factory. We have laying in our files a coal bill from

the respective coal company that they had shipped to a certain location. If it is a discounted bill, we would pay it. If it is a thirty-day bill, we would hold that and check it against the invoice, and that would be our verification that the coal had been received and the bill was in line for payment.

Q. In other words, the accounting division acts as a control system of all the plants and factories of the Borden Company wherever they may be situated? A. That is right.

Q. Is there anything else that the accounting department does that you have not mentioned? A. No.

Q. What about the payroll records here, do they have
149 anything to do with that? I mean the building payroll. A. That is on the ninth floor.

Q. What are the activities of the Borden Company on the ninth floor? A. The stock department. They keep track of all production, all sales.

Q. This stock department is part of your accounting department, is that correct? A. Yes.

Q. How do they keep check or control over the production of Borden products in these individual plants and factories over the country? A. They send in a semi-monthly and monthly statement of their production, by products.

Q. What does the accounting department do with these reports that they get from the individual plants and factories? A. They compile records of the inventories, add the production to it, decrease it by their sale, and have an
150 inventory at the end of the outlay. We run a perpetual inventory for every plant and factory.

Q. Does the accounting department have anything to do with the increase or decrease of inventories for the production of Borden products of these individual plants and factories? A. No. It just acts as a sort of control check.

Q. And who uses these results of the stock department? A. They are used in arriving at the final statement of the finished stock on hand, raw materials and supplies. The

manufacturing department is kept fully advised by the factories as to their requirements. We would know generally from the inventory, but if a factory ran short of stock, the stock department would not be interested. Raw materials and supplies and the actually finished stock records are kept in the cost department on the eighth floor. The stock department is the compiling agent of those records from a quantity standpoint only, which are turned over to the cost department who apply the cost of production to the quantities produced to establish their finished stock or finished stock records. Manufactured materials are controlled entirely by the cost department. Our stock department is a stock department of finished goods only. 152
It has no bearing on manufacturing materials.

Q. And those reports would be of use to what particular division of the Borden Company? Just for the purpose of having general information with regard to the finished products of the company? A. No. The stock department is dependent upon another department on the ninth floor, which is the sales tabulation department. If you start off at the beginning of the period with an inventory of stock, the tabulation sales department make the tabulation of all the sales made to the customers that tie in, from a money standpoint, with the charge to the accounts receivable.

Q. The figures of the sales tabulating department would jibe with your accounts receivable department? A. Yes.

Q. What is the function of the income tax department 153
with reference to the activities of the Borden Company? A. The filing of federal, state, dominion and provincial income tax returns.

Q. Is that based on information obtained from the accounting department? A. From the accounting department, as far as the manufactured products division is concerned. In the income tax department there is a situation that represents the entire Borden organization. Look at this from a national basis. There you lose all lines of de-

marcation as to division, or what have you. That is what we might term as one of the departments that come under the corporate accounting set-up. In other words, that is the Borden Company.

Q. As a result of the said work in the income tax department, are there ever changes in methods of production for articles proposed? A. No.

Q. Is it the function of the income tax department to allocate the operations of business of the Borden Company in different states throughout the Union? A. No.

Q. Don't they segregate the activities of the Borden Company? A. That information is all obtained from the sales
155 tabulation department from the amounts of business in the various states.

Q. Does the income tax department have any direct contact or communication with the factories and plants of the Borden Company throughout the nation? A. No.

Q. It only works internally in this building? A. That is right. There are very few of our departments, outside of the manufacturing department, that will contact the various plants direct. All of that contact work is done from my office. As a matter of illustration—there was a change in the tax law on liquor. They will write me a memorandum to the effect that on a certain date there was a change in the tax on liquor. They will ask me what the inventories of spirits at our various locations were, whether it
156 was brandy, or in other words, the type of liquor and quantity. I get all of that information and turn that over to the tax department so that they can make up the return and requisition a check to pay for the tax. They will check up matters of rebates on laws that have been put in effect on various tax measures.

Q. As a result of the work done by the income tax division, are taxes paid to the home offices of the states entitled to the same? A. Yes.

Q. Are returns prepared in this building and shipped across state lines? A. Yes.

Q. Are there any other activities of the Borden Company on the ninth floor? A. The payroll tabulation.

Q. What do they do? A. They draw the check to pay the employees.

Q. Where? A. In this office and throughout the United States.

Q. How does that work out? A. We have a salary classification as far as amount is concerned, in the majority of cases. If any employee receives an amount equal to or above the salary classification, he is paid from this office. In other words, the rank and file at our affiliated divisions 158
are paid locally. It is only the higher paid workers who are paid from here.

Q. What about the ordinary employees of the Borden Company in this building, are they paid from this accounting division? A. All employees in this building are paid from this office.

Q. Are checks mailed from the home office to these executives outside of the State of New York? A. Yes.

Q. They are mailed periodically? A. They are mailed semi-monthly.

Q. In the case of other employees who are paid through the factories and divisions where they work in various parts of the country, are they paid by check or by cash? A. They are paid by check drawn by the factory.

Q. Do you get a duplicate of those checks or a list of 159
checks drawn? A. We get the cancelled checks. They come to the bank reconciliation department.

Q. There are no other activities conducted by the Borden Company on the ninth floor, other than those mentioned? A. No.

Q. On the tenth floor you have the controller's office. Will you tell us what the function of the controller's office is with respect to the activities of the Borden Company?

A. The activities of the department are those indicated as my activities, in answer to the question asked yesterday: "Will you please explain your duties and the duties of your accounting office in connection with the division that you are connected with?"

Q. What is your control over personnel outside of the State of New York? A. None.

Q. How would your office be affected by union or labor problems outside of the State of New York? A. Not any.

Q. Who would handle labor relations matters arising from various factories? A. The legal department exclusively.

161 Q. Where are wage policies determined? Wage policies of people employed in the various factories? A. The manufacturing department has charge of that. Questions of union recognition and the like would be handled by the legal department.

Q. Who would have charge of the problems of ways of getting new employees if there is a labor shortage? A. That would be up to the factory's superintendent.

Q. Who has control of priorities and allocation of materials? A. The priorities division located in this building.

Q. Does the legal department take part in the bargaining with labor? A. I don't know.

Q. Coming back to the accounting department, are accounting reports prepared in this building ever sent across state lines from the New York office to plants outside of
162 the state? A. Yes.

Q. Are there any other activities of the controller's office which you didn't mention in your answer yesterday? A. That would be hard to answer, because it isn't strictly all accounting, the work that I do.

Q. You mentioned yesterday about visiting plants and factories of the company throughout the United States. What would be the reason for your visits at these plants and factories? A. From an administrative standpoint, personnel and accounting procedure.

Q. You would exercise direct supervision and control over the plants that you visit? A. From an accounting standpoint, yes.

Q. As far as personnel, what would the extent of your work be? What would you do with regard to personnel? A. Offer suggestions as to either increase or decrease of personnel in that office.

Q. Would you be more or less of a trouble shooter for the company when you went out to these plants and factories? A. No, I would say more educational.

Q. To educate the superintendents of these plants? A. It would be not so much in the plants, more sales offices.

Q. You would instruct them as to methods and pro- 164
cedure developed at the home office here so that there would my a systematic running of the business of the Borden Company? A. That is right.

Q. After these visits were completed, you would instruct them as to their duties with respect to the home office? A. In reporting to the home office, yes.

Q. You continue direct control and supervision over the plants and factories from the home office upon your return to the home office? A. That is right.

Q. Would you have anything to do with the purchasing of raw materials or supplies for these plants? A. No.

Q. All you would do is check the supplies and raw materials? A. I wouldn't even do that.

Q. You would check inventories? A. No.

Q. Is there anything that you can think of that we haven't 165
mentioned as far as the controller's office is concerned? A. No, I don't believe there is.

Q. In your migrations to the plants of the Borden Company, would you personally employ any of the personnel or interview them? A. I might, yes.

Q. You have a photostat division on the tenth floor. What is the extent of their activities? A. Making photostat copies

of financial statements and other things that might have to be photostated, such as correspondence, cancelled checks.

Q. And would the products of this photostat division be sent across state lines from the home office? A. Yes.

Q. Who would handle the shipment of the photostats from the home office? A. I am not entirely sure. I think they are shipped over to our stationery room on 45th Street.

Q. Where is the stationery room? A. On East 45th Street—our print shop.

Q. What other activities are there on the tenth floor? A. We do photo offset work on the tenth floor.

Q. Where would these photo offsets be sent? A. All over
167 the country.

Q. Would this be to your sales district managers? A. To various affiliated companies or divisions. We send them letterheads, forms.

Q. This would be done regularly on the tenth floor? A. Yes.

Q. Would any orders for photo offset work be sent to this building? A. Yes.

Q. From the various plants and factories throughout the country? A. Yes.

Q. As a result of these orders, photo offset work would be done here and these orders would be met from work done on the premises? A. Yes.

Q. Can you give us any idea of the quantity of work that is done in the photostat department? A. Do you mean
168 from a production standpoint? The majority is done for the home office here.

Q. About how much is produced for shipment across state lines? A. I wouldn't know exactly.

Q. Can you give us an approximate idea of the quantity of photo offset work that is produced on the tenth floor and sent across state lines? A. I couldn't say.

Q. Could you explain what you mean by photo offset work? What have you in mind when you use that phrase?

Your photo offset work would be a substitute for the typewriter? A. It is an entirely different process. Photo offset is part photography and part printing. The advantage of photo offset work is that quantities can be made in quick time, and the use of the photo offset work is for copies of financial statements, instructions to plants and factories, letters regarding OPA rules and regulations and instructions, WPB instructions, priority letters of instruction.

Q. And these photo offset letters are mailed in quantities across state lines to individual plants and factories of the Borden Company? A. Yes.

Q. Will you state approximately the average quantity of photostat and photo offset work produced on the tenth 170
floor of this building and shipped across state lines from October 24, 1938 to date? A. I don't know offhand. I will get the information for you.

Q. You mentioned forms being prepared by the photo offset department on the tenth floor. What forms are prepared? A. When I say forms—I might want a special form printed up in a hurry. I would get them to do that instead of the stationery room because I could get much better service.

Q. Would memoranda be prepared by the photo offset department for use at the plants and factories of the company throughout the United States? A. Yes.

Q. Would accountants reports be prepared and photo offset here and then transmitted to the various plants and 171
factories of the organization? A. Yes.

Q. How about briefs? Would they be done in the same way? A. No.

Q. Is there anything else that the photo offset department does that you have not mentioned? A. No.

Q. Who is in charge of the photostat division? A. J. W. Strasser.

Q. Is he an officer of the company? A. No.

172 *Plaintiffs' Exhibit 1—Deposition of Wyman.*

Q. Are you in charge of the accounting office in this building? A. Yes.

Q. You are not an officer of the company? A. No. Our accounting department is departmental. We have heads for each department.

Q. How many employees are there in the photostat division? A. Five or six.

Q. What is the maximum number since November, 1938, to the best of your recollection? A. Six.

Q. Are there any other activities of the Borden Company on the tenth floor? A. General accounting department.

173 Q. What is their function? A. The compiling of statistical and financial statements and property records.

Q. Where are these records used? A. By the officers of the company in this building.

Q. Are those records ever sent across state lines to places outside of the State of New York? A. Yes.

Q. Directly or indirectly? A. Directly.

Q. Are those the records that are photostated by the department on the same floor? A. Yes.

Q. Are they sent regularly or at different intervals of time? A. Regularly.

Q. For what purpose are they used? A. To advise the executives and the various divisions of their operations.

Q. What is it based on? A. Their sales volume only.

174 Q. How do these plant superintendents act on these reports that you forward to them? A. We do not send those reports, or any financial statement, to a factory superintendent. The financial statements are originally created by another division of the Borden Compa[illegible]. There is no financial statement ever given to facto[illegible]perintendents.

Q. Where do these statements go? A. To the home office of the division.

Q. Where would these home offices be? A. Throughout the United States. 175

(Examination adjourned to May 6, 1943, at 2 P. M., at the same place.)

EXAMINATION continued pursuant to adjournment.

Direct testimony.

Q. Mr. Wyman, when you referred to "these premises", "Madison Avenue", "New York Office" and New York in general, did you mean the premises at 350 Madison Avenue? A. As I recall, yes. 176

Q. What is the amount of photostats or photo offset work done on the tenth floor in premises 350 Madison Avenue? A. For the year 1938, $4,488.49; 1939, $23,352.51; 1940, $28,071.87; 1941, $31,171.74; 1942, $15,475.04. That covers the period October 24, 1938 to May 1, 1942, by years.

Q. What are these figures, cost figures or sales figures? A. They are cost figures.

Q. Do you know how the cost figure is arrived at with reference to the photostat and photo offset work? A. Labor, rent, heat and light, depreciation and material.

Q. Are any administration expenses included? A. No, sir. 177

Q. Can you tell us what percentage of the photostat and photo offset work produced went across state lines? A. By years?

Q. Yes. A. For the year 1938, subsequent to October 24, 5.26; 1939, 5.38; 1940, 4.13; 1941, 3.99; 1942, 4.41.

Q. How did you compute those percentages? A. Checking back our records on the shipments that went direct to Borden units outside of New York State.

Q. Would these percentages include any work that went indirectly to those plants and factories outside of the State of New York? A. No.

Q. Have you any record of that work? A. No.

Q. What is the equipment of the plant on the tenth floor for photostat work and photo offset work? A. A photostat machine and a dryer, for the photostat. For the photo offset, a camera, machine for the transferment of the negative to a metallic plate. The metallic plate is then developed, dried, and placed on a printing machine.

Q. Any other machinery in the plant? A. A paper cutting machine.

179 Q. Do you have the cost of the machinery that is in the plant? A. Yes.

Q. What did it cost? A. As of April 30, 1942, $12,750.75.

Q. Do you do any photostat work or photo offset work for anybody other than the Borden Company? A. No.

Q. This is exclusively for the Borden Company? A. That is right.

Q. Do instructions to the various factories of the Borden Company, dealing with the production of goods, constitute a substantial portion of the matter which is photostated? A. No.

Q. What sort of memoranda are prepared by the photostat and photo offset department for use at the plants and factories of the company throughout the United States? A. That might be a memorandum form that the factory is

180 to use in reporting to Madison Avenue.

Q. What else? A. Accounting instruction letters.

Q. What else? A. Regular authorized forms that are given for numbers.

Q. Is there any other work done by the photostat or photo offset plant that you have on the tenth floor, that you have not mentioned before? A. No.

Q. Is there anything else on the tenth floor in which the Borden Company engages, that you have not mentioned

before? A. No. There is the public accounting department. When our records are audited each year, we have to have some place for the auditors to use as an office. It is really a matter of accommodation.

Q. These facilities are only for the independent auditors that come in from time to time? A. That is right.

Q. What are the activities of the Borden Company on the eleventh floor? A. Those are the executive offices.

Q. What executives occupy the facilities on the eleventh floor? A. The president of the Borden Company, the executive vice-president, the treasurer, one or two vice-presidents, secretary, assistant secretary and assistant treasurer. 182

Q. In a general way, what are the duties of the president of the Borden Company? A. Formulating policies for the Borden Company operations.

Q. Has he anything to do with the issuance of instructions to any of the plants and factories of the Borden Company wherever they may be situated? A. Not directly.

Q. How does he do it, if it is not directly? A. It would be through the vice-president in charge of the particular operation where running instructions might be changed.

Q. In other words, he would be the responsible head of the organization, with whom the officer in charge would consult? A. Naturally.

Q. The decisions which he reaches as to methods of production, running instructions, etc., are, through instructions which he gives to other people in this building, carried out? A. Yes. 183

Q. Would any of these instructions affect the production of commodities of the Borden Company wherever they are produced? A. Not necessarily.

Q. In what situation would they emanate from him? A. Mr. Montague is the responsible head of the Borden organization with whom subordinate heads consult with reference to the policies and other questions as they arise.

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Q. What about the vice-presidents? A. I have accounted for all of the vice-presidents with the exception of a few. They are Mr. George M. Waugh, Jr., executive vice-president, Mr. R. V. Jones, vice-president in charge of ice cream, Mr. Harold W. Comfort, vice-president in charge of fluid milk operations, Dr. Harry A. Ross, our economist, and Mr. C. F. Kieser.

Q. I think we should start with Mr. Waugh, Jr. Tell us what his duties are. A. He is a liaison man between the president and other operating vice-presidents.

Q. Please explain in detail the duties of Mr. Waugh, Jr. A. We will start off with the accounting policy of the com-
185 pany; the expansion with respect to new buildings and new products in connection with part of the Borden operations; the approval of new acquisitions of companies producing a product other than formerly sold by the Borden Company or a product now produced by the Borden Company. These expansions are confined mostly to the manufacturing division.

Q. Would Mr. Waugh have direct control over any of the activities or would he work through these vice-presidents in charge of special divisions of the Borden Company? A. Through the vice-presidents.

Q. In connection with new buildings and new production, would it be Mr. Waugh who would make the decisions, subject to the approval of the president of the Borden Company, whether to buy new land, erect a new factory there,
186 discontinue an old factory, and would he similarly make decisions as to production of new commodities or products or purchase of companies in allied lines? A. Yes.

Q. He would also make decisions as to new methods of production, labor devices, etc.? A. No.

Q. Who would? A. The vice-president in charge of the operation in this building. The recommendation might be concurred in by the president or the vice-president in charge of the actual operation.

Q. In this building, decisions would be reached as to new methods of production, new machinery for production, and instructions sent out to the various factories? A. Yes.

Q. Where are meetings of the board of directors held? A. On the eleventh floor of 350 Madison Avenue.

Q. What are the duties of the Borden directors? Would it be a correct statement to say that they guide the general policy of the company? A. Yes.

Q. Would they have to approve of any of these decisions for new acquisitions of land or other companies? A. They are submitted to the board for approval. It is really a ratification.

Q. Who are the board of directors? A. Albert G. Mil- 188
lank, chairman, Harold W. Comfort, L. Manuel Hendler, Austin S. Igleheart, Robcliff V. Jones, Lester Le Feber, Madison H. Lewis, Theodore G. Montague, Marcus M. Munsill, Thomas I. Parkinson, Beverley R. Robinson, Harry A. Ross, George M. Waugh, Jr.

Q. Who is the next vice-president whom we have not discussed? A. Mr. C. F. Kieser.

Q. What are his duties? A. He is in charge of the special products department.

Q. Does he have any other duties besides control over the special products division? A. No.

Q. What other vice-presidents are there? A. Mr. R. V. Jones, in charge of ice cream operations.

Q. Please explain what Mr. Jones' duties are. A. I am
getting a little out of my field now, to be perfectly frank 189
with you. I don't know.

Q. Does the Borden Company have an ice cream division in this building? A. No.

Q. Are any of the activities of the Borden Company in this building connected with the production and sale of ice cream? A. Yes.

Q. What activities? A. Through the vice-president.

Q. What else? A. That is all.

Q. What about the manufacture of ice cream, is he in charge of that? A. No.

Q. Who is in charge? A. That is mostly local.

Q. Where is the accounting department of the ice cream division? A. They are all over the country. They are in groups. The final statements come to Madison Avenue and are consolidated into one grand total.

Q. Does advertising for the ice cream companies originate here? A. Yes.

Q. Does the label department approve all labels for ice cream, the same way as it approves of labels for other departments? A. Yes.

191 Q. Do you have any activities with reference to the production of ice cream in this building? A. No.

Q. Is ice cream produced by the Borden Company or its subsidiaries for shipment across state lines? A. Yes, but not in a substantial quantity.

Q. To what extent? A. I couldn't tell you.

Q. You don't have plants in every state of the Union, do you? A. No.

Q. How many plants do you have that produce ice cream? A. I don't know.

Q. Is ice cream, manufactured by the Borden Company or its subsidiaries, sold in every state of the Union? A. No.

Q. In what parts of the country is it not sold? A. I don't know.

192 Q. Who would know? A. Mr. R. V. Jones.

Q. What are the duties of Mr. H. W. Comfort? A. Vice-president in charge of fluid milk operations.

Q. What aspects of the work of the various departments of the Borden Company in this building affect and concern fluid milk? Does the label department approve of the labels on fluid milk? A. Yes.

Q. What other departments? A. That is all.

Q. Advertising? A. Yes, the general advertising would.

Q. Does the Borden Company and its subsidiaries produce a substantial amount of fluid milk which is sold across state lines? A. No.

Q. Is the production of fluid milk controlled by any person or persons in the building at 350 Madison Avenue? A. No more so than the ice cream division.

Q. What about Dr. Ross? What are his duties? A. I think he is a forecaster.

Q. Forecaster of what? A. Food products.

Q. Does he make surveys for the purpose of determining whether or not a product should be manufactured by the Borden Company or withdrawn from the market? A. No. He is an economist with the Borden Company for the 194
purpose of forecasting business trends as they affect the activities of the Borden Company over the nation, both as to purchasing production and sales, and inventories of stocks and raw materials, and he recommends, as a result of surveys which he makes, certain actions by the Borden Company, such as increases or decreases of particular inventories, or whether the sales department can anticipate an increase or reduction in supply.

Q. Is any production increased or decreased as a result of his forecasts? A. It may be. Those are the regular duties of Dr. Ross, but they have been changed by the impact of the war.

Q. Does he have a staff of assistants in this building? A. Yes.

Q. What facilities does he use in his work in this building? 195
A. What do you mean?

Q. I mean he occupies some office space; he must tie in with your organization here. A. He has two assistants who assist him in the preparations of statistics upon which he predicates his conclusions.

Q. Who uses these forecasts or conclusions which are arrived at by Dr. Ross and his staff? A. Various divisions of the Borden Company.

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Q. In this building? A. In this and outside of this building.

Q. Does he have any direct relationship with the plants and factories of the Borden Company all over the nation? A. No.

Q. How does he do his work? A. He works through the vice-president in charge of operations.

Q. Where are the financial statements of the Borden Company for the information of stockholders and others prepared? A. In the general controller's office.

Q. Are they sent from the building to the stockholders? A. No.

197 Q. Where are they sent from? A. The stockholders only get an annual report.

Q. Is it sent from this building? A. No, from our dividend-disbursing agent.

Q. Would this be a correct statement—that the figures to be included in the annual report to stockholders are collected in this building, that the report itself is written in this building, and then it is printed outside of this building and sent by your dividend-disbursing agent across state lines to the various stockholders of the Borden Company? A. Yes.

Q. Where are meetings of the stockholders held? A. In Flemington, New Jersey.

Q. Who is the treasurer of the Borden Company? A. Mr. E. L. Noetzel.

198 Q. What are his duties? A. He is the one who is advised of the cash position of the Borden Company. He consummates loans; is the supervising officer of the accounting department, credit department, bureau of insurance and safety bureau.

Q. What individuals in the Borden organization are responsible to the treasurer of the company? Does the treasurer of the Borden Company exercise any direct control

over the activities of the Borden Company? A. Yes, from a financial standpoint.

Q. Does he have any direct relationship with the plants and factories of the Borden Company in the State of New York and outside of the State of New York, in a financial way? Does he have anything to do with the placing of loans of plants and factories here and elsewhere? A. He would borrow for the Borden Company.

Q. Would any of these loans be obtained for the purpose of expansion of plants, for the purpose of installing new equipment in plants, for the purpose of production in these plants and factories, wherever they may be situated? A. Yes. 200

Q. Does Mr. Noetzel personally negotiate the loans for the corporation? A. Yes.

Q. He doesn't borrow only from New York banks, does he? A. I would say it was only New York banks.

Q. He wouldn't borrow from a bank in Chicago or Philadelphia? A. No.

Q. What is the name of the secretary of the Borden Company? A. Walter H. Rebman.

Q. What are his duties? A. Attending and writing up the minutes of the various board of directors meetings of the Borden Company and affiliated companies and divisions. He keeps all the corporate records.

Q. Does he have anything to do with the out of state plants of the Borden Company? A. Yes.

Q. In what respect? A. If we should form a company in a state and there is going to be an issuance of stock, he will take care of that issuance of stock, usually through our local attorneys. 201

Q. When necessary, he would affix and attest the seal of the corporation throughout the country, wherever said seal and attestation is required? A. That is right.

Q. Would that document be sent across state lines? A. Yes.

Q. What are the duties of the assistant secretary? A. He performs the duties of the secretary, subject to his direction.

Q. What are the duties of the assistant treasurer? A. The same as the assistant secretary, as applying to the treasurer.

Q. Are there any other activities of the Borden Company on the eleventh floor? A. No.

Q. What are the activities of the Borden Company on the twelfth floor? A. There are the offices of the subordinates of the treasurer who help him carry out his duties.

Q. What are the duties of the general controller and his
203 department? A. He is in charge of general accounting procedure for the Borden Company, its affiliates and divisions. His name is Harry L. Camp. The general controller's office is the origin of all instruction letters to various regional accounting representatives in connection with accounting procedure that would affect various operating units established by the Borden Company. The general controller's office is the focal point for the compilation of consolidated income and balance sheets for the Borden Company and its affiliates and divisions, which consolidations are in turn passed on to the officers of the company. I think that generally covers everything.

Q. What is the central transcribing bureau? A. That is where practically all of the dictation is transcribed for the
204 various departments throughout the Madison Avenue organization.

Q. In other words, in general, most of the employees do not have their own secretaries, but when they have dictation it is done up there? A. That is right.

Q. Do they use ediphones? A. Yes.

Q. Are all inter-office communications transcribed there? A. Yes, with the exception of where the individual has a secretary.

Q. Is it frequently necessary for men in the different departments in this building to consult with each other? A. Yes.

Q. How do they travel from one department to another? A. Either by stairs or elevator.

Q. This transcribing office is just a convenience only for the people in 350 Madison Avenue? A. Yes.

Q. In connection with these conferences following elevator trips, are decisions frequently made that affect the production of goods by subsidiaries of the company, which production is to be shipped across state lines? A. Yes.

Q. Will you tell us, briefly, the activities of the purchasing department on the thirteenth floor? A. Mr. W. P. 206
Morse is in charge of that department. He purchases raw materials and supplies for the Borden Company.

Q. How is that done? Do Salesmen visit the Borden premises or the offices on the thirteenth floor for the purpose of selling the Borden Company raw materials or supplies? A. Not exclusively.

Q. How is it done? A. Through contracts.

Q. Who would be in charge of the letting of these contracts? A. The department manager, Mr. Morse.

Q. Would these contracts be advertised, or would they be privately negotiated? A. Privately negotiated.

Q. Would these contracts cover raw materials for all the plants and factories of the Borden Company wherever situated? A. In some instances.

Q. In most instances, what would occur? A. We might 207
contract with various sugar refineries to supply so much sugar, at the direction of Madison Avenue.

Q. Would he purchase supplies and machinery? A. Yes, sir.

Q. If the Borden Company were in the market for a very large quantity of something, would the supervisor of purchases, Mr. Morse, have occasion to visit plants out-

side of the State of New York to see that the set-up was such that they could fulfill a large contract? A. Not so much from that standpoint as it would be to determine their requirements.

Q. I am talking about Mr. Morse visiting the plant or some plant with whom he is negotiating to purchase their merchandise. He would want to be sure that he is going to get the flow of merchandise that the company requires. Would he make a trip to such a plant to satisfy himself? A. I believe he would.

Q. In other words, Mr. Morse, and the people under him in the purchasing department on the thirteenth floor of
209 this building, supervise, negotiate and make contracts for purchasing substantially all of the major supplies, machinery and raw materials needed by the Borden Company and its subsidiaries and affiliates for the production of goods? A. Yes.

Q. Would these raw materials and machinery and products be sent across state lines pursuant to the direction and control of Mr. Morse? If he bought merchandise here it would be shipped from here to let us say Pennsylvania? A. Yes.

Q. How would he determine the requirements of a plant or a factory or a division of the Borden Company? A. Through correspondence with that factory or division.

Q. How would that work out? Would a plant superintendent notify Mr. Morse? A. That would come from the
210 operating vice-president.

Q. What are some of the products purchased by the purchasing department in this building? A. Sugar, coal, tin plate, labels, fibre boxes, wooden boxes, coffee, cleaning powder, heavy machinery, cocoa, malt, liquor, bottles, caps, ice cream cartons, barrels.

Q. And such purchases are used as aids in the production of goods for shipment across state lines? A. Yes.

Q. Are there any other activities of the purchasing department on the thirteenth floor which you haven't mentioned? A. No.

Q. Are there any other activities of the Borden Company on the thirteenth floor? A. No.

Q. When was the Employees Relations Department established? A. March 2, 1942.

Q. Who is in charge of the Employees Relations Department? A. Mr. E. G. Quesnel.

Q. Is he an officer of the Borden Company? A. No.

Q. What, in general, are the duties of the Employees Relations Department? A. The employing of employees, and classification of and adjustment of employees' salaries. 212

Q. Persons employed where? A. 350 Madison Avenue.

Q. Exclusively concerned with this building? A. Yes, sir.

Q. It has nothing to do with the employees in the various factories? A. No, sir. I would like to qualify that. They do not have anything to do with the employing of maintenance men.

Q. What kind of employees are affected by this division? A. Office employees.

Q. They do not employ any persons who act in an administrative capacity? A. They will employ individuals who work in administration departments, but they are clerical help.

Q. They do not employ the heads of those departments? A. No, sir. 213

Q. Who is in charge of the safety bureau on the fourteenth floor? A. Mr. Quesnel.

Q. What are the duties of the safety bureau? A. The direction of safety operations throughout the Borden Company.

Q. Including the factories where goods are produced for shipment across state lines? A. Yes.

Q. He develops, and supervises the development of, systems by which such operations may be conducted more safely? A. Yes, sir.

Q. He investigates methods and mechanisms that can be used for the safety of production employees? A. Partially, yes, in cooperation with the bureau of insurance.

Q. Does he have anything to do with the purchasing of safety equipment for these plants? A. No.

Q. When he reaches a conclusion as to steps to be taken in the plants for the safety of employees, does he send such instructions across state lines to the various factories? A. Yes.

215 Q. Are not such instructions often photostated? A. I cannot recall.

Q. Does the safety division do anything else besides the things you have mentioned? A. No.

Q. What about the stationery department on the fourteenth floor—who is in charge of it? A. Mr. J. W. Strasser.

Q. Is this the stationery department for the activities of the Borden Company at 350 Madison Avenue? A. No; for the entire Borden Company.

Q. Does he send stationery supplies to your plants and factories over the nation, wherever needed? A. Yes.

Q. Who directs him to send these supplies? A. The individual affiliates or divisions.

Q. And what do these supplies consist of? A. Purely stationery.

216 Q. In what quantities are they sent to these plants and factories? Are all the stationery supplies of the plants and factories of the Borden Company, wherever situated, filled by Mr. Strasser's department on the fourteenth floor? A. Not entirely.

Q. To what extent? A. In some instances we might get a better local price than we could print the stuff at our print shop.

Q. But most of the stationery supplies would originate from that division and be sent to the plants and factories from this office building? A. No.

Q. From where are they shipped? A. From various places outside this building, pursuant to instructions given by Mr. Strasser.

Q. Does the Borden Company print its own stationery? A. Yes.

Q. Where are the print shops? A. On East 45th Street.

Q. Is that print shop under the jurisdiction of Mr. Strasser? A. Yes, sir.

Q. And the print shop sends the stationery across state lines under instructions from Mr. Strasser's department? 218
A. Yes, sir.

Q. All of the printing of the Borden Company is done at that print shop on 45th Street, is that correct? A. Not all of it. A substantial part of it.

Q. What other printing is done there? A. The annual report, some advertising material.

Q. When stationery is shipped across state lines to a given division or plant, it is charged by the Borden Company to that plant? A. That is right.

Q. At cost? A. Yes, sir.

Q. Are the stationery and letterheads, and other printed matter on the stationery, written and designed in this building? A. Yes.

Q. Who determines that? A. I would say the officers of 219
the company.

Q. You use uniformity in your stationery? A. Yes, sir.

Q. Does Mr. Strasser's department supply all the divisions of the Borden Company with stationery supplies from this building? A. Yes, with few exceptions.

Q. Are there any other departments on the fourteenth floor? A. The public relations department, in charge of Mr. Milton Fairman.

Q. What are his duties? A. I don't know. He is director of public relations activities for the Borden Company.

Q. What about relations with the Federal government and State government, do they have charge of that? A. Yes, I think they would.

Q. Does it cover all the public relations activities of the Borden Company, wherever the Borden Company is in business? A. I would say yes, throughout the country.

Q. Who is in charge of the special products division on the fifteenth floor? A. Mr. Charles F. Kieser.

Q. Is he an officer of the Borden Company? A. Vice-president.

Q. What special products are within the jurisdiction of this division? A. Animal foods, live stock foods, poultry
221 foods, vitamins, flavors and concentrates. I think that is all.

Q. Are such products manufactured for shipment across state lines? A. Yes.

Q. Does this division operate in substantially the same way as the casein division operations, subject to such changes as are necessitated by the different products? Is production supervised from this building? A. Yes. No products are produced in this building.

Q. Does the label department determine the design of the label and contents of the label, the same way as it determines labels for any other product of the Borden Company? A. Yes.

Q. Would a new food product come under that depart-
222 ment? A. A new food product might come up under any one of the divisions.

Q. Is there anything else on the fifteen floor which you haven't mentioned? A. They have their little advertising department the same as casein and Mr. Ramsdell.

Q. Do they have their own separate sales department? A. Yes.

Q. Do they have any salesmen operating from the office here? A. Yes.

Q. About how many are there? A. I don't know exactly how many there are.

Q. Do those salesmen operate outside of the State of New York? A. Yes.

Q. No sale is consummated without the approval of Mr. Kieser's division in this building? A. That is right.

Q. Are there any other activities of the special products division of the Borden Company on the fifteenth floor of premises 350 Madison Avenue? A. They have other divisions under their supervision, if that is what you mean.

Q. What divisions are they? A. They have a liver plant operation, fish canning operation and fish meal operation.

Q. Those goods are produced for shipment across state 224
lines? A. Yes.

Q. The raw materials for those products are purchased through the special products division? A. Yes, and also in conjunction with the purchasing department.

Q. For use in states other than the State of New York? A. Yes.

Q. The finished products are then sent across state lines? A. Yes. I was also going to say they have a fresh fish business.

Q. How does the fresh fish division of the special products division operate? A. Through refrigerated cars to distributors. It is entirely a wholesale business.

Q. Where is this business conducted? A. Santa Barbara, California.

Q. Is fresh fish sold across state lines or is it purely 225
local in California? A. Local. They also deal in fish livers.

Q. Are fish livers used in the vitamin business of the Borden Company? A. Yes.

Q. Are these operations directed from the special products division of the Borden Company on the fifteenth floor of 350 Madison Avenue? A. Yes.

Q. Do they cross state lines? A. Yes.

Q. Are there any other activities of the special products division? A. No.

Q. Who is in charge of the general advertising department on the sixteenth floor? A. Mr. Stuart Peabody.

Q. What activities are carried on in that department? A. The Borden Company's general and institutional advertising. In other words, advertising devoted primarily to promoting good will for the Borden Company as an institution.

Q. What steps in connection with such general and institutional advertising are taken in this building? Is the copy written on the sixteenth floor or elsewhere in this
227 building? What steps in connection with the advertising of the Borden Company commonly take place in this building? A. It is my understanding that the following is done: The original ideas for the advertising are commonly created in this building by men working in this building. Rough drafts of the advertisements are prepared in this building, the advertisements are drafted in final form and the copy finally prepared either in this building or by our independent advertising agencies; the advertisement in final form is always approved in this building, it is then sent from this building to printers for preparation and transmission to the publications. The finished advertisement, as printed, is approved in this building in all cases. Thereafter it is sent to the company's publications.

228 Q. Does Mr. Peabody work in cooperation with Mr. Ramsdell's advertising division in this building? A. Yes.

Q. What advertising work is done by Mr. Peabody's department which is not done by Mr. Ramsdell? A. None.

Q. In other words, they more or less overlap? A. That is right. While Mr. Ramsdell's unit of advertising comes in on the Elsie end of it, one of their principal advertising media is the matter of display, the approval of customers' advertisements for Borden products in outlying districts.

Q. Are mats ever sent out of this building across state lines? A. No.

Q. What are the activities of the bureau of insurance on the sixteenth floor? A. The placing of all types of insurance for the Borden Company.

Q. Is the Borden Company a self-insurer? A. Partially.

Q. In what respects? A. Fire.

Q. Do they place any security in states where their plants and factories may be, for the purpose of complying with the self-insurance laws of those states? A. Yes, for certain types of insurance, where it is required.

Q. Does this office on the sixteenth floor of this building have charge of insurance for the various factories of the 230
Borden Company all over the country? A. I am not in a position to state that that office has charge of the insurance or self-insurance for the factories of the manufactured products division—the manufacturing group, which includes casein, national milk sugar and special products. We would place from this office the newly created war risk insurance, at given locations where we thought it would be needed.

Q. And the policy of placing insurance over the nation for the plants and factories of the Borden Company, would be determined by the vice-president in charge of this particular bureau on the sixteenth floor? A. Yes.

Q. Is it true, that in order to get the lowest possible rates on premiums, it is often necessary or desirable to 231
install safety devices in the factories of the Borden Company? A. I would say yes. This is done in cooperation with the safety division.

Q. And do engineers operating out of the insurance division or safety division in this building make surveys of the various plants where goods are produced for shipment across state lines, and make recommendations for improvements in those factories? A. Yes.

Q. Is insurance placed on products purchased by the Borden Company for its plants and factories over the nation? A. We insure our finished products at locations. The self-insurance plan would take care of the factory and its contents.

Q. What about the insurance of raw products or other types of products purchased for these plants and factories? A. They would be insured if they were in an outlying storage location, by the bureau of insurance at 350 Madison Avenue. They would cover marine insurance of our fleet on the Pacific coast.

Q. Are there any other activities on the sixteenth floor?
233 A. No.

Q. What are the activities of the Borden Company on the seventeenth floor? A. The experimental kitchen and the laboratory.

Q. Who is in charge of the kitchen? A. Miss Dorothy Belmanno.

Q. What are her duties? A. Experimenting with recipes for our products.

Q. What is done with the results of her experimentation? A. It is made up in booklet form and sent out to the trade.

Q. What is done with the physical results? A. I don't know.

Q. Suppose she makes a recipe—I assume a product is then manufactured based on her recipe? A. No, it is for the housewife. To give you an example—when we built this
234 kitchen we also built a little breakfast nook. Mr. Montague and his clients might go upstairs and have luncheon. If it is something that is prearranged, Miss Belmanno might try out a new recipe. In the majority of cases, the results of a new recipe are consumed right there in the kitchen.

Q. As far as the recipes themselves are concerned, they would then be typewritten, photostated or photo offset and sent to the printer? A. Those recipes would appear in a newspaper or periodical or recipe book.

Q. The Borden Company would print those recipe books and distribute them? A. We could.

Q. You do not know whether it has been done? A. I do not.

Q. So far, the information you have given us indicates that the experimental kitchen is used to determine ways in which a consumer can use Borden products. Is that correct? A. Yes.

Q. Is the kitchen and laboratory also used to determine ways in which Borden products may be made? A. Yes.

Q. Tell us something about that. A. I think there are two separate entities there. I don't think that the kitchen can be tied in in any way with the laboratory. 236

Q. Let us hear about the laboratory. A. The laboratory really got under way last July or August, and the principal item of experiment to which they devoted nearly 100% of their time, was in the manufacture of a good coffee extract and powder. First they would determine the amount of cooking that the coffee should receive before the liquor was drawn off. When they arrived at what they considered was the proper schedule, that schedule would be transmitted to our operating factory and they would base their production on that schedule. After the coffee product had been produced at the manufacturing plant, they would send in samples to see how they correspond with the coffee as produced here and laboratory tested.

Q. You say it was started around July or August. What was done before then? A. It is brand new. Our kitchen used to be on the third floor. 237

Q. Before last July or August, when it was down below, was it purely a kitchen to develop recipes by which consumers might use Borden products, or did it do any of the work similar to what you described? A. No. All they had down there was a range and a G. E. refrigerator. No experimental work was done in this building.

Q. You say there is nothing on the eighteenth floor? A. No.

Q. On the nineteenth floor, the department of industrial relations was established in 1943. Is that correct? A. Yes.

Q. There is nothing on the twentieth floor? A. No. The real estate department is on the twenty-first floor.

Q. Does that deal with this building? A. Activities are not confined 100% to this building.

Q. Who is in charge of this division? A. Mr. A. C. Bowman. He is in charge of all of the property of the Borden organization.

Q. What aspects of it is he in charge of? A. The only
239 thing Mr. Bowman would have to do with a factory is if we had a factory that was not a profitable operation and we wanted to get rid of it, we would tell Mr. Bowman and he would try to sell it.

Q. If you desired to erect a new factory in a new locality, Mr. Bowman would be in charge of trying to buy land? A. Not necessarily. We might find that out through the local superintendent who knew of property that could be acquired.

Q. Would he make leases for any properties which the Borden Company was interested in? A. Yes.

Q. That would be for plants that would be operated by the Borden Company? These plants would be all over the nation? A. Yes.

Q. Any leases that would be made locally by a plant
240 superintendent would have to be with the approval of Mr. Bowman at 350 Madison Avenue? A. Not necessarily.

Q. Have the activities of the Borden Company in this building, as you have outlined them, been substantially the same since October 24, 1938 to date, except where you have otherwise indicated? A. Substantially the same, ex-

cept that it was during that period that the Borden Company acquired the fish and liver business.

(Sgd.) STEPHEN EVERETT WYMAN
Stephen Everett Wyman

Sworn to before me, this
3rd day of August, 1943.

(Sgd.) ROSEMARY PURCELL
Notary Public, Queens County
Queens Co. Clk's No. 1867, Reg. No. 1005
Certificate Filed in
N. Y. Co. Clk's No. 88, Reg. No. 4-P-52 242
Commission expires March 30, 1944
(Notary Seal)

I, BESSIE MILLER SCHWARTZ, the officer before whom the foregoing deposition was taken, do hereby certify that the witness, whose testimony appears in the foregoing deposition, was duly sworn by me and that said deposition is a true record of the testimony given by the said witness.

(Sgd.) BESSIE MILLER SCHWARTZ
Bessie Miller Schwartz

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244

Plaintiffs' Exhibit 2.

Deposition of Raymond V. Marshall.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Deposition of RAYMOND V. MARSHALL, pursuant to stipulation, at Room 1014, 350 Madison Avenue, New York City, on the 18th day of May, 1943, at 3 P. M.

245 PRESENT:

NEWGASS & NAYFACK, Esqs., Attorneys for Plaintiffs. GEORGE W. NEWGASS, NATHAN COOPER and LEO H. HIRSCH, JR., of Counsel.

MILBANK, TWEED & HOPE, Esqs., and JOHN A. KELLY, Esq., Attorneys for Defendant. JOHN A. KELLY and GEORGE F. KEENAN, of Counsel.

RAYMOND V. MARSHALL, Witness.

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the parties hereto, that notice of the taking of this deposition be waived; that the deposition of Raymond V. Marshall be taken before Bessie M. Schwartz, a
246 Notary Public, at Room 1014, 350 Madison Avenue, New York City, on the 18th day of May, 1943, at 3 P. M.; that all objections as to the qualifications of said Notary be waived; that this deposition may be read in evidence upon the trial of this action regardless of the availability of the witness at such time; that the filing of this deposition be waived; that compliance with Rule 13 of the Local Rules of this Court be waived; that certification of the deposition by the Notary Public before the same is taken is hereby waived; that this

deposition may be sworn to by the witness before any Notary Public, and that a copy of this deposition shall be delivered to the attorneys for the defendant.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

RAYMOND V. MARSHALL, being first duly sworn by Bessie M. Schwartz, a Notary Public, testified as follows:

Direct testimony.

Q. What is your full name? A. Raymond V. Marshall.
Q. Where do you reside? A. Larchmont, New York. 218
Q. Address? A. 11 Jochum Avenue.
Q. What is your occupation? A. Building manager.
Q. For whom? A. The Borden Company.
Q. How long are you the building manager for the Borden Company? A. Since approximately 1937. I don't know what month.
Q. Of what building are you the manager? A. 350 Madison Avenue.
Q. What are your duties as building manager for the Borden Company building at 350 Madison Avenue? A. I rent, collect, and supervise the management of 350 Madison Avenue.
Q. Do you have anything to do with the hiring and firing of maintenance employees at 350 Madison Avenue? A. I 249
do.
Q. Do you hire and fire? A. Yes.
Q. Do you instruct them as to their duties? A. Well, that is left up to a superintendent, but sometimes I tell them. When a man first comes to us I outline his duties and pass him over to the superintendent.
Q. Are you familiar with the duties of the various employees? A. Yes.

250 *Plaintiffs' Exhibit 2—Deposition of Marshall.*

Q. Who is the building superintendent? A. Leroy Smith.

Q. Does he have an office in this building? A. Yes.

Q. Do you have an office in this building? A. Yes.

Q. Where? A. Room 2107. He is in the basement.

Q. Do you have any employees under you in your office on the twenty-first floor? A. Yes.

Q. How many employees do you have? A. One now. There used to be two up to the 15th of this month.

Q. Do you know the following persons: Joseph Borella, Walter Cross, Stanley Gayda, Edward Gramcko, Stanley Grzeck, Alexander Krupica, William Lendo, Thomas Lo Sasso? A. Yes. Walter Cross was a night porter. Stan-
251 ley Gayda was a porter. Thomas Lo Sasso was a porter and then we lost our stock room clerk and now he is stock room clerk.

Q. We are only interested for the period from October 24, 1938 up to May 1, 1942, with slight modification. A. Robert Marshall was a porter, and Andrew Rueb was a porter.

Q. Are they and were they employees of the Borden Company for the period subsequent to October 24, 1938? A. Yes.

Q. What was the nature of their duties? A. They were porters. Porters are assigned to so many floors of the building, to take care of all public space, that is, lavatories, corridors and stairways. Then they are called upon to
252 pack papers at a certain time during the day—the waste paper that we send out. They are called upon to move furniture, if you have to have it moved—if you wanted a desk moved inside, you would call the porters and they would move it.

Q. They would move furniture belonging to the Borden Company, too? A. Yes.

Q. They would be assigned all over the building at 350 Madison Avenue? A. Yes.

Q. Each porter would have a floor assigned to him? A. That is right.

Q. Do they do any cleaning work in the offices of the Borden Company? A. Yes.

Q. Please explain. A. The way we work it is, the porters are for corridors and public space, but if we had an alteration job or something like that, and one of the offices became dirty, they would have to go in and clean it up, although the job of cleaning offices is left to the night women. But they do come in to offices when they are asked. It is not frequent, but they do it.

Q. Who would direct them? A. I would call the superintendent and the superintendent would get hold of the foreman and the foreman would get the office cleaned. 254

Q. Who is the foreman? A. The foreman in this list is Stanley Gayda.

Q. Who would ask you to have these porters assigned for cleaning the offices of the Borden Company or the offices of the tenants? A. Various Borden people.

Q. Various Borden people would call you up and you would act upon their request? A. Yes.

Q. Can you name some of the people who would request you to do this? A. Mr. Wyman.

Q. Anybody else from the Borden organization? A. Any department head, I suppose—Mr. Olmstead.

Q. With respect to the waste paper, what would be done with that? A. It is bagged, and a dealer comes along and takes it out. It is left down in our basement and they come 255 along around 3 o'clock in the morning and take it out.

Q. It is sold to them? A. Now it is. About a month ago we had to give it away.

Q. How about the period subsequent to October 24, 1938? A. The market was up and down. Sometimes we sold it and sometimes we had to give it away.

Q. But it was sold at some time during that period? A. Yes.

256 *Plaintiffs' Exhibit 2—Deposition of Marshall.*

Q. To whom was the paper sold? A. A fellow by the name of Pezza. He is a paper dealer in Manhattan, somewhere uptown.

Q. Are there any other duties that the porters rendered in premises 350 Madison Avenue? A. Cleaned down the elevator shafts once a year. Just general cleaning and maintenance, that is all.

Q. Don't some of the porters distribute towels in the offices of the Borden Company? A. That's right. One distributes towels to the Borden Company.

Q. Would that be in all the offices of the Borden Company at 350 Madison Avenue? A. Yes.

257 Q. He would pick up the dirty towels and exchange them for clean towels, and this would be done regularly once a week? A. Yes.

Q. Are any of the group of people named above night porters? A. Yes.

Q. What are their duties? A. There is where you get in a little more to the inside space, that is, the occupied space. They are Walter Cross and Stanley Grzeck. They will be called upon to scrub linoleum, wax it, and do high dusting.

Q. In the offices of the Borden Company? A. Yes. They will also help the women with the very heavy vacuum cleaner. This office is vacuumed twice monthly. They wheel the vacuum in and the women go around with it.

Q. These two night porters would work over the entire
258 building? A. Yes. Their duties are all over, because they are not responsible for any confined area, such as certain floors. One duty of the night porters is to clean the elevator doors we have downstairs.

Q. Do the porters do any other work besides that which you have enumerated? A. Occasionally they would destroy old records of the Borden organization in the furnaces down in the basement of the Borden building at 350 Madison Avenue.

Q. Do the porters have anything to do with the furnaces in the basement other than the destruction of the records? A. They clean out the boilers. We have three boilers with which we heat the building. The New York Steam Company operates those boilers on a very cold day to relieve their steam pressure. We have a little boiler that was used years ago. That's where we burn the papers.

Q. Is that done regularly? A. We clean the tubes and boilers once a year. They have to be cleaned.

Q. What facilities do you have for the maintenance people down in the basement of 350 Madison Avenue? A. Locker room, lavatories, shower.

Q. Do any of these men take care of the heating equipment and the hot water equipment of the Borden Company? 260
A. The basement porter cleans up the basement and he can turn valves off and on if he is asked to. If he happens to be down there and the superintendent knows he is there and wants the heat turned on, he would call him.

Q. When these boilers are fired, who fires them? A. The New York Steam Company would take care of that.

Q. During the rest of the year these boilers are not used? A. No.

Q. What do the porters do in the main lobby of premises 350 Madison Avenue? A. They scrub the floor, clean all the metal work, clean the marble and the ceiling fixtures. That is all.

Q. What do they do on rainy days? A. The same thing. 261
They also roll out the rubber mat and put up the canopy.

Q. Do they have anything to do with the moving of furniture from outside to office space in the building? Supposing I wanted to have a desk sent in from outside, would the porters have to handle that? A. The outside people would bring it in.

Q. When there are alterations and changes in the Borden organization at 350 Madison Avenue, do the Borden porters move the furniture around to the new places? A. Yes.

Q. They assist in the alterations? A. They assist to this extent—we have the contractor come in and he makes all the necessary changes, plastering, etc., and he cleans up—broom-clean, as they call it. It's still pretty messy, and our porters go in and clean it up.

Q. Does this occur frequently? A. Fits and starts. A lot today, none for the next three months, something like that. Frequently during a year, you might say.

Q. Do you know the following persons: Charles J. Burke, Ole Hofseth, Walter C. Menyhart, James McCarthy, Michael November, Leonard Quinn, Thomas M. Treacy? A. Yes.

263 Q. What are their occupations? A. Elevator operators. They operate all the elevators at 350 Madison Avenue.

Q. Are all of these men elevator operators? A. Yes.

Q. Don't you have elevators assigned for the exclusive use of the Borden officials in this building? A. No.

Q. How many elevators are assigned to cover the floors from the ground floor to the twelfth floor? A. Four.

Q. Are there any tenants between the ground floor and the twelfth floor? A. Yes.

Q. Who are they? A. On the second floor, Eastman Kodak and Western Union. The American Society for the Prevention of Cancer, and James H. Ripley, on the sixth floor. On the seventh floor, a Dr. Fiske, Keystone Portland Cement, executive offices of Wally Frank. On the eighth floor, James J. Fitzgerald, Guy Wright, and
264 Recordak Corporation. On the ninth floor, Goslin-Birmingham, Beckett Paper Co., Manheimer Bros., Santee River Hardwood Co., and D. L. Fulton. On the tenth floor, Newgass & Nayfack, and Dr. Smith. The eleventh floor is Bordens. On the twelfth floor, Augusta Bliss Reese, W. W. Reese, Greendale Ferry Co., and Fox River Paper Co.

Q. Have these people occupied space in this building throughout the period from October 24, 1938 to May 1, 1942? A. A good part of it; maybe all of it. There might

be an expiration in there one way or another. We have some new ones down there.

Q. Have any who occupied space moved out since May 1, 1942? A. I wouldn't trust to memory on that.

Q. Can you approximate what percentage of the floor space from the ground floor to the twelfth floor was occupied by the Borden Company and its divisions? A. Approximately 75%.

Q. Do any one of these tenants manufacture goods in the premises? A. No.

Q. You know that of your own knowledge? A. Yes. It is in our lease that they should not manufacture any goods. We are an executive office building and manufacturing 266
would be against the zoning regulations of the building.

Q. What does Eastman Kodak do on the second floor? A. They keep records of their sales in their store down below on the first floor.

Q. What does Recordak Corporation do on the eighth floor? A. They have their executive offices for the machinery that they sell to banks. As I understand it, they take a photograph and shrink it down.

Q. Do they have a show room in the Recordak offices here? A. I guess they have. They have one of their machines there, and I suppose it is called a show room.

Q. Do they do any developing of their process in their offices? A. Only for experimental purposes, that I know of. They have a fellow down there who tinkers around 267
with some things. That is as far as I know. They have a big plant on 23rd Street.

Q. What is the American Society for the Prevention of Cancer? A. This is the head office. They go out and get appropriations and donations, and what not.

Q. Do you know whether they write any advertising material on the premises? A. They might. That is a question I wouldn't know.

Q. What does Ripley do? A. Just a personal office.

Q. What business is he in? A. He used to be an engineer. I don't know whether he is still an engineer or not.

Q. What offices does Dr. Fiske have here? A. 711 to 712.

Q. What is his profession? A. An osteopath.

Q. What is the business of the Keystone Portland Cement? A. This is a New York office. Their main office is in Philadelphia. This is their executive office. They don't manufacture anything here.

Q. What does Wally Frank do, on the seventh floor? A. He has his own personal office there, and a couple of assistants, for his various stores.

269 Q. What business is he engaged in? A. Pipes, and purveyors of tobacco.

Q. What business is James J. Fitzgerald in? A. That is another personal arrangement.

Q. What is the business of Guy Wright? A. Christian Science practitioner.

Q. What is Goslin-Birmingham? A. Sugar machinery. This is a branch office.

Q. Do they manufacture sugar machinery? A. Yes.

Q. These are the executive offices? A. No, it is a New York branch.

Q. Where do they have their main office? A. Birmingham, Alabama, I think.

Q. What is the business of the Beckett Paper Co.? A. They are manufacturers of paper stationery.

270 Q. Where are their plants? A. Out west. This is a branch office.

Q. What is the business of Manheimer Bros.? A. Real estate and law.

Q. What is the business of the Santee River Hardwood Co.? A. Lumber.

Q. Where is their main plant? A. St. Stephens; they have a branch office here.

Q. What is the business of D. L. Fulton? A. He is a milk broker.

Q. Any connection with the Borden Company? A. No.

Q. Dr. Smith is a dentist, and Newgass & Nayfack a law firm, on the tenth floor? A. Yes.

Q. What about Augusta Bliss Reese? A. It is an estate.

Q. W. W. Reese is connected with that office? A. Yes.

Q. What is the Greendale Ferry Co.? A. They are managers of ferry lines. The Port Washington to New Rochelle ferry was one of theirs.

Q. Do any of their ferry lines go across state lines? A. I don't know all the ferry lines that they have.

Q. Where does the Fox River Paper Co. have its plant? 272
A. Appleton, Wisconsin. They have a branch office here. The New York representative is here.

Q. Do you have elevators in the building for the tenants and for the Borden organization between the ground floor and the twelfth floor? A. Yes.

Q. Are the elevators used for the inter-floor and inter-office communication of the Borden organization? A. Yes.

Q. Are the staircases used for that same purpose? A. Yes.

Q. Do the porters clean the staircases? A. Yes.

Q. Do the porters clean the elevators? A. Yes.

Q. Do they also dry the elevator floors on rainy days? A. Yes.

Q. Do they also wax the linoleum on the elevator floors? 273
A. Yes.

Q. Do they clean the elevator doors and frame-work on each of the floors? A. That is part of their public space work.

Q. Do you issue any instructions with regard to the carrying of personnel of the Borden Company in the elevators in premises 350 Madison Avenue? A. No.

Q. How many other elevators do you have in the building? You mentioned four. A. We have four others.

Q. What floors do these elevators take care of? A. They run express from the ground floor to the eleventh floor, and from then on local to the top of the building.

Q. What tenants are there on the floors from the thirteenth floor on? A. On the thirteenth floor would be Hurdman & Cranstoun.

Q. What business are they in? A. Certified public accountants. On the fourteenth would be Richard B. Carter.

Q. What business are they in? A. Personal. Then there is William H. Davis. They have charge of advertising in some military magazine. There is Frank Crawford. He is an importer and exporter. Ronald Grose and Pittsburgh
275 & Shawmut Coal Co. Ronald Grose is a Christian Science practitioner. Pittsburgh & Shawmut Coal Co. is in the coal business, in Pennsylvania. This is a branch office. Louis J. Snyder—that is personal, I don't know what he does. On the fifteenth floor, Herman Duval, insurance. William H. Gale, Christian Scientist. I. Koffenburgh & Sons, leaf tobacco brokers. Safety Equipment Manufacturing Association—that is an association for automobile safety equipment. On the sixteenth would be Hartwell Ayles, advertising, and A. B. Chance, machinery. This is a branch office. Their main office is out west somewhere. Eighteenth is J. O. Ross, engineering. Nineteenth, Lester Holmes, attorney. J. J. Arnold. F. & J. Weiss, real estate and law practice. Julia M. Johnston, Christian Scientist. On the twentieth floor, Robert Boyd Ward Fund.
276 That is a fund set up by the Ward baking man. Weed & Co., radio advertising. Jeanne Trimmer, Harper method for men. Twenty-first, H. A. Florsheim—a yarn broker. Mrs. McConemy, a Christian Science practitioner. K. DeLacy-Bourke—I think that is just personal. Mitchell & Van Winkle, lawyers. Allied Board of Trade—that is a company for the fabric trade here in New York. On the twenty-second, there is the Standard Stoker Company,

branch office, manufacturers of stokers for railroads. Their main manufacturing plant is in Erie, Pennsylvania. McLean, Ferris & Ely, lawyers. Bernitz Furnace Company, manufacturers of furnace equipment. Their main office is in Boston. On the twenty-third floor, Arnold, Hoffman & Co. That is a manufacturing company. Their main office is in Providence, Rhode Island. Their business is machinery and paints. Cordage Institute—that is an association for the cord and rope industry. There is Western States Machine Company. They are manufacturers of sugar machinery, and their main office is in Wisconsin. That is all I can think of.

Q. What about the pent house? A. The Phoenix Art 278
Institute, an art school, used to be there, but they're out.

Q. The tenants you describe as occupying space above the twelfth floor in premises 350 Madison Avenue, are they the people who occupied the space there from October 24, 1938 to May 1, 1942? A. Yes.

Q. Approximately how much space above the twelfth floor did the Borden Company occupy? A. Not very much—about 25%.

Q. How much of the whole building is occupied by the Borden Company? A. 57%.

Q. Is that based on feet? A. Yes.

Q. Do any of these advertising agents in the building do work for the Borden Company? A. No.

Q. Do they write copy in this building? A. Ayles is 279
more of a display man.

Q. Does he draft the layouts of display advertising? A. I suppose he does.

Q. Do Weed & Company write script? A. No. What they do is really represent. They are radio representatives. As I understand their business, they have a certain number of stations tied up, and if you want to advertise on that certain hook-up you go to Weed & Company and they will give you the time that is available.

280 *Plaintiffs' Exhibit 2—Deposition of Marshall.*

Q. They represent the station, in other words? A. Yes.

Q. Do you know the following persons: William L. De Graaf, John B. Donegan, William Kay and Jesus Echevaria? A. Yes.

Q. Were they employed by the Borden Company for the period from October 24, 1938 to May 1, 1942? A. Yes.

Q. What were their duties? A. Night watchmen at premises 350 Madison Avenue.

Q. In detail, what were their duties? A. We have seventy-four stations called "Watchman's Keys" distributed around various parts of the building, ranging from the top floor motor room to the basement, and at certain hours they
281 have their clocks with them and they go up and punch their clocks with these keys, in rotation, all the way down. That is all.

Q. Are they supposed to go into the various offices and see if everything is all right? A. Only if they have a watchman's key.

Q. Would you say that the purpose of having watchmen in the building is to protect the building and its contents from fire and theft? A. Yes.

Q. Do they do anything else besides the activities you just mentioned? A. When the women cleaners come in, one of the watchmen will take the women up to the various floors.

Q. Don't they have something to do with permitting
282 employees of the Borden Company to enter the offices of the Borden Company at 350 Madison Avenue after office hours? A. That is about the only other thing. They will insist that every person entering the building sign a regular building night register on the ground floor before going up into the building, and also signing on departure.

Q. During what period is that? A. After 7 o'clock at night and on Sundays.

Q. During those periods they operate the elevators? A. No. We have a regular man for that; a night elevator operator.

Q. Do any of these maintenance employees have anything to do with the moving of freight in or out of the building? A. What do you mean by freight?

Q. I mean furniture, office equipment, merchandise being sent from outside to tenants in the building, samples of the Borden products from the office of the Borden Company elsewhere. A. That's possible. I can't tell you any specific cases. Let's put it this way—that if somebody, either Borden or tenant, wants to send something out of the building, they might be asked to take it downstairs until the express man will call for it. It could be anything. If you wanted to crate that chair up and send it somewhere, you would ask for a porter to take it downstairs. 284

Q. Who runs the elevator from the basement of the building to the street level on the 45th Street side of the Borden building? A. Porters and stock room clerks.

Q. You mentioned stock room before. Who is in charge of the stock room? A. Right now it's Thomas Lo Sasso. Before that it was a fellow by the name of Charles Fromm.

Q. What does the Borden Company have in the stock room? A. Supplies for this building—lamps, soap, electrical outlets, switches, wire, nuts, bolts, and anything that would pertain to the operation of the building.

Q. Would that be for the convenience of tenants as well as the Borden Company? A. The whole building.

Q. Is there anything else in the basement of the Borden building which you haven't mentioned before? A. There's a mechanics shop, vaults for the Borden Company which nobody goes into. The disbursements department has a vault and they are the only ones who have the key to it. 285

Q. You mean the disbursements division of the accounting department of the Borden Company? A. Yes.

Q. About how large is that vault? A. 10 x 20.

Q. Who has a key to that vault? A. Various Borden departments. The treasurer's office has a vault there, the real estate office, the secretary's office, the disbursements division.

Q. Is that vault an exclusive Borden activity? A. Yes.

Q. When records are destroyed in the water boiler in the Borden building, are the records taken from this vault or from various divisions of the Borden Company in the building? A. I would say both. Some employees might come down from the various departments that have these vaults and ask to have the records removed.

Q. What machinery do you have in the basement of the Borden building? A. We have a pump room, which is machinery for the building. That pumps the water up to the tanks on the roof. We have a vacuum pump for the heating system. We have a blower motor down there for ven-
287 tilation. We have a number of little motors down there for ventilation purposes.

Q. Who would be in charge of those motors? A. Mechanics.

Q. Would any of the maintenance men operate these machines? A. No. They might clean them, but not actually operate them. Of course a good many of them are mechanical.

Q. Do any of the maintenance men have anything to do with the photostat department on the 10th floor of this building? A. They are asked to go in and mop up the floor about once a week, ten days or two weeks.

Q. Don't they clean the paper scraps that result from the work done? A. They're all put in a big barrel or con-
288 tainer and put out by the elevator, and they take them down at night.

Q. Do they have anything to do with the supplying of power for the machinery in the photostat department? A. No.

Q. Is that connected with the regular electrical work in the building? A. Yes.

Q. How about the fluids that are used in that department? A. It is poured down the drains.

Q. Do they bring in all the raw materials to the photostat plant on the tenth floor? A. Yes, they would do that. It comes up in crates and they dump it off on the floor and then the photostat boys take care of it from there.

Q. Would these crates be brought up on the elevators? A. Yes.

(Sgd.) RAYMOND V. MARSHALL
Raymond V. Marshall

Sworn to before me this
20th day of July, 1943.

(Notary seal) 290

(Sgd.) ROSEMARY PURCELL
Notary Public,
Queens County
Queens Co. Clk's No. 1867, Reg. No. 1005
Certificate Filed in
N. Y. Co. Clk's No. 88, Reg. No. 4-P-52
Commission expires March 30, 1944.

I, BESSIE MILLER SCHWARTZ, the officer before whom the foregoing deposition was taken, do hereby certify that the witness, whose testimony appears in the foregoing deposition, was duly sworn by me and that said deposition is a 291 true record of the testimony given by the said witness.

(Sgd.) BESSIE MILLER SCHWARTZ
Bessie Miller Schwartz

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Defendant's Exhibit A.

Affidavit of Stephen Everett Wyman.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

293

STEPHEN EVERETT WYMAN, being duly sworn, deposes and says:

I am Controller of the Manufactured Products Division of The Borden Company and Regional Accountant for several companies and divisions of The Borden Company.

I have heretofore testified in this action before Bessie M. Schwartz, a Notary Public. My deposition was duly sworn to on August 3, 1943, and I have been informed that the same is on file herein.

On page 36 of said deposition I testified that there is a photostat and photo offset department on the tenth floor of The Borden Company building at No. 350 Madison Avenue, New York, New York. There are and have been at

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all times mentioned in the Complaint not more than six employees employed in said department. There are 822 employees employed by The Borden Company in the building at No. 350 Madison Avenue.

The equipment in this department is used for making copies of statements, reports and instructions which are not sold but are transmitted to offices and plants of the defendant and its subsidiaries.

Defendant's Exhibit A—Affidavit of Wyman. 295

Annexed hereto and made a part hereof is a statement of the relation of the cost of photostat and photo offset work sent from No. 350 Madison Avenue to Borden Company plants outside the State of New York to the gross sales and the net sales of The Borden Company.

STEPHEN EVERETT WYMAN,

Sworn to before me this
2nd day of September, 1943.

WM. H. THOMAS,
Notary Public,
New York County.

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RELATION OF PHOTOSTAT & PHOTO-OFFSET COSTS TO COMPANIES AND DIVISIONS OUTSIDE OF NEW YORK STATE TO THE GROSS SALES AND NET SALES OF THE BORDEN CO.

	Photostat & Photo-offset Costs	*Gross Sales*	*% of Gross Sales*	*Net Sales*	*% of Net Sales*
Year 1938 (Nov & Dec only)	$ 236.24	$ 33,405,111.91	.00000707	$ 32,405,704.76	.00000729
Year 1939	1,257.08	208,789,250.58	.00000602	202,272,796.03	.00000621
Year 1940	1,159.80	216,795,850.86	.00000535	209,439,970.13	.00000554
Year 1941	1,243.53	259,128,514.71	.00000480	251,050,606.91	.00000495
Year 1942 (Jan 1st to Apr 30th)	682.98	95,472,963.21	.00000715	93,027,551.98	.00000734

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Defendant's Exhibit B.

Affidavit of Raymond V. Marshall.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

RAYMOND V. MARSHALL, being duly sworn, deposes and says:

302

I am the Building Manager of The Borden Company building located at No. 350 Madison Avenue, New York. New York.

I have heretofore testified in this action before Bessie M. Schwartz, a Notary Public. My deposition was duly sworn to on July 20, 1943, and I have been informed that the same is on file herein.

The total rentable area of premises No. 350 Madison Avenue is 198,018 square feet.

As of April, 1942, The Borden Company occupied 115,710 square feet.

The photostat and photo offset department occupies 1,781 square feet. This figure is .0153 of the total area occupied by The Borden Company.

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RAYMOND V. MARSHALL.

Sworn to before me this
1 day of September, 1943.

EDWARD A. WASEMIN,
Notary Public,
New York County.

304

Opinion of Judge Conger.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

NEWGASS & NAYFACK, Esquires, Attorneys for plaintiffs, GEORGE W. NEWGASS, NATHAN COOPER, and LEO H. HIRSCH, JR., of Counsel.

MILBANK, TWEED & HOPE, Esquires, and JOHN A. KELLY, Esquire, Attorneys for Defendant, JOHN A. KELLY and
305 GEORGE F. KEENAN, of Counsel.

EDWARD A. CONGER, *U. S. D. J.*

The plaintiffs bring this action, which was tried before the court without a jury, on their own behalf and on behalf of other employees of the defendant similarly situated. The action against the defendant is brought to recover overtime compensation and an equal amount as liquidated damages plus a reasonable attorney's fee pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938 (29 U. S. C. A. Sec. 216 (b)).

Jurisdiction is conferred upon this Court by virtue of Section 24 (8) of the Judicial Code (28 U. S. C. A. Sec. 41 (8)).

There are no facts in dispute.
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The defendant is a foreign corporation, organized under the laws of New Jersey, licensed to do business in this state and doing business in this district. It is the owner of a building located at 350 Madison Avenue, New York City, of which it occupies, in whole or in part, approximately seventeen of the twenty-four floors of the building in connection with the operation of its business. The head office of the defendant is located in this building, and the

defendant occupies approximately 58% of the total rentable area of the building.

The plaintiffs are employed in connection with the operation and maintenance of the building as porters, watchmen, elevator operators, etc.

Plaintiffs contend that defendant is engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act. It bases this contention on two grounds. First: That defendant is engaged in the physical production of goods on the premises.

With respect to this claim, there are only two facts that merit attention. One is that ideas and rough drafts for labels, which are to be affixed to the products of the defendant and for advertising material for use throughout the country and abroad, emanate from this building. 308

The other is that the photostatic plant maintained by the defendant in the building is engaged in the production of goods and 5 percent of its output is shipped across state lines.

I can't convince myself that either of these activities constitute "production of goods" as defined by the Act.

These activities, however, may and should be considered in connection with the real question presented here and that is whether the nature of the business carried on by the defendant at 350 Madison Avenue is such that plaintiffs may be said to be engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act. Defendant concedes that it is engaged in interstate commerce, but it denies that it is engaged in the production of goods at 350 Madison Avenue in New York City. 309

Defendant's business consists mainly in the sale and distribution of fluid, condensed and evaporated milk, casein, ice cream, butter, cheese and the products manufactured from milk. These products are processed, prepared or manufactured at factories and plants located throughout the United States and distributed from the plants and factories.

The actual production of goods for commerce is carried on in buildings separated entirely from 350 Madison Avenue.

The business of defendant is national and international.

At 350 Madison Avenue are the offices of the executives of the defendant, together with other employees (clerical), and the maintenance employees. It is the home office of the defendant and here are the various departments which direct and supervise the entire business of defendant.

In this building is the accounting department, with its various divisions; the sales division, the credit department, the traffic division, the legal department, the safety division; the Board of Directors hold their regular and special meetings here.

311

Notwithstanding all this, no "goods, wares, products, commodities, merchandise or articles or subjects of commerce of any character or any part or ingredient thereof * * * are produced, manufactured, handled or in any other manner worked on", in this office building.

I can only conclude that defendant at 350 Madison Avenue is not engaged in the production of goods for commerce but are engaged in interstate commerce.

We now must pass on to the status of these plaintiffs. The question now presents itself: Are they engaged in interstate commerce? On this question, the nature of plaintiffs' activities is controlling and not the business of the employer.

312

There are two classes of employees contemplated by the Act; those engaged in the production of goods for commerce and those engaged in commerce.

The Act itself makes a difference between the two. As to the second, the Act limits it to those actually engaged in commerce, but as to the first class there is no limitation. It covers, not only those who participate in the physical process of the making of the goods, but also those employees

engaged in any process or occupation necessary to the production.

It was as to the status this second class of employees, that the Supreme Court passed on in *Kirschbaum* v. *Walling*, 316 U. S. 517. Plaintiffs may not invoke that decision in support of their claim. They are in the other class, i.e. those engaged in commerce.

I am satisfied that this case comes within the reasoning, *Stoike* v. *First National Bank of the City of New York*, 290 N. Y. 195.

This question is passed on fairly and squarely and all of the recent Supreme Court decisions on this point are discussed and analyzed. Among other things, the Court of 314
Appeals said:

> "We think that in framing section 7 (subd. a) of the Act Congress intended definitely to distinguish between the scope of those categories of employees which it described as being 'engaged in commerce' and those engaged 'in the production of goods for commerce.' The phrase 'in commerce' was not intended to include within its scope that wide field of activities which remotely *affect* interstate commerce. Whenever Congress, acting under the commerce clause, has wanted to embrace that broader field it has definitely expressed that purpose."

See also 315

Johnson v. *Dalls Downtown Development Co.*, 132 Fed. (2d) 287.

Hinkler v. *Eighty-three Maiden Lane Corp.*, 50 F. Supp. 263.

Callus v. *10 East Fortieth Street Bldg.*, 51 F. Supp. 528.

McLeod v. *Threlkeld*, 319 U. S. 491.

The Supreme Court in this last case laid down this rule:

> "The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it. Employee activities outside of this movement, so far as they are covered by wage-hour regulation, are governed by the other phrase, 'production of goods for commerce'."

317 In the light of the provisions of the Act and the authorities construing the Act, I can only conclude that the work of these plaintiffs is not so closely allied to the activities carried on in the building at 350 Madison Avenue that these employees may be said to be engaged in interstate commerce.

I find that the plaintiffs are not within the coverage of the Act.

Judgment for the defendant on the merits with costs.

Dated: New York, New York, December 7, 1943.

EDWARD A. CONGER,
United States District Judge.

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319

Defendant's Proposed Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

The defendant submits the following proposed Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. That the defendant is a foreign corporation organized 320
and existing under and by virtue of the laws of the State of New Jersey.

2. That the defendant is licensed to do business and is doing business in the State of New York and in the Southern District of New York.

3. That the defendant is engaged in the business of processing, manufacturing, selling and distributing fluid, condensed, and evaporated milk, casein, ice cream, butter, cheese and various other products.

4. That the defendant does business throughout the United States and in foreign countries.

321

5. That the defendant owns and operates plants and factories in the United States and Canada where it processes, manufactures, sells and distributes its products.

6. That the defendant owns a twenty-four story office building at No. 350 Madison Avenue, in the City, County and State of New York.

322 *Defendant's Proposed Findings.*

7. That the plaintiffs are building maintenance employees, namely, porters, elevator operators and watchmen who were employed by the defendant in connection with the operation and maintenance of said building.

8. That the defendant maintains its home office in said building and occupies, in whole or in part, approximately seventeen of the twenty-four floors and 58% of the total rentable area.

9. That the President, Executive Vice-President, Vice-Presidents, Treasurer and Assistant Treasurers, Secretary
323 and Assistant Secretaries and other officers of the defendant are housed in said building; that the employees in the General Accounting, Public Accounting, Cashier's, Photostat, Central Transcribing, Stationery, Sales, Credit, Traffic, Legal, Safety, Mailing, Labelling, Income Tax, Stock, Purchasing, Public Relations, Employee Relations, Advertising, Insurance, Industry Relations, and Real Estate Departments are likewise housed therein; and the Board of Directors of the defendant hold their regular and special meetings therein.

10. That the defendant directs, supervises, manages and controls its entire business through the aforesaid directors, officers and employees.

324 11. That the ideas regarding the form and contents of advertisements used by the defendant in advertising its products originate in said building and also in the various operations of The Borden Company located outside said building; and the rough and final drafts of said advertisements are likewise prepared in said building and in the various operations of The Borden Company outside said building; and none of the advertising is printed in or distributed from said building.

12. That the ideas regarding the form and contents of the labels which are affixed to The Borden Company products originate in said building and also the various divisions of The Borden Company located outside said building; and drafts of said labels are likewise prepared in said building and in various divisions of The Borden Company located outside said building; and none of said labels are printed in or distributed from said building.

13. That said Photostat Department, maintained and operated by the defendant in said building, occupies 1,781 square feet or .0153 percent of the total area occupied by the defendant in said building; that not more than six 326
employees are employed in said department; that as of April 30, 1942 the cost of the machinery and equipment in said department was the sum of $12,750.75.

14. That the employees in said department are engaged in making copies of statements, reports and instructions which are transmitted exclusively to the offices and plants of the defendant and its subsidiaries, and none of which are sold or offered for sale.

15. That from October 24, 1938 to December 31, 1938, 5.26 per cent. of these statements, reports and instructions were transmitted to points outside the State of New York; in the year 1939, 5.38 per cent.; in the year 1940, 4.13 per cent.; in the year 1941, 3.99 per cent.; and in the year 1942, 327
4.41 per cent.

16. That the defendant does not produce, manufacture, handle, process or in any other manner work on any goods in said building.

17. That the remainder of said building not occupied by The Borden Company is occupied pursuant to written agreements of lease by various persons, firms, partnerships, associations and corporations.

18. That none of said tenants produce, manufacture, handle, process or in any other manner work on any goods in said building.

CONCLUSIONS OF LAW

1. That the defendant is engaged in interstate commerce at premises No. 350 Madison Avenue, in the City, County and State of New York.

2. That the defendant is not engaged in the production of goods for commerce at premises No. 350 Madison Ave-
329 nue, in the City, County and State of New York.

3. That the tenants of the defendant are not engaged in the production of goods for commerce at premises No. 350 Madison Avenue, in the City, County and State of New York.

4. That the plaintiffs are not engaged in interstate commerce.

5. That the plaintiffs are not engaged in the production of goods for interstate commerce or in any process or occupations necessary to the production thereof.

6. The plaintiffs are not within the coverage of the Fair
330 Labor Standards Act.

7. The defendant should have judgment against the plaintiffs on the issues in this action on the merits.

I hereby order and direct that a judgment be entered accordingly.

331

Plaintiffs' Exceptions to Proposed Findings of Fact and Conclusions of Law of Defendant and Plaintiff's Proposed Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT;

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

The plaintiffs take exception to the defendant's proposed Findings of Fact numbered "11", "12", "16", and to the defendant's proposed Conclusions of Law numbered "2", "4", "5", "6" and "7".

332

The plaintiffs submit the following proposed Findings of Fact:

7a. That unlike elevators in an ordinary office building, the elevators in the said building are regularly employed as a vital connecting link between the various departments of defendant's organization; that said elevators are engaged in carrying defendant's office employees on inter-office business in the said building.

7b. That unlike elevators in an ordinary office building, the elevators in the said building are regularly employed in carrying reports, ediphone disks and raw and finished products to and from the defendant's photostat and photo-offset plant on the tenth floor of said building.

333

7c. That the plaintiffs are employed in an occupation necessary to the carrying on by the defendant's directors, officers and employees housed in said building, of their respective duties, which duties include either the production of goods in the said building for interstate commerce or activities necessary to the carrying on by the defendant of

production for commerce in defendant's plants and factories in various parts of the United States and Canada.

9. That the President, Executive Vice-President, Vice-Presidents, Treasurer and Assistant Treasurers, Secretary and Assistant Secretaries and other officers of the defendant are housed in said building; that the employees in the Manufacturing Department and in the General Accounting, Public Accounting, Cashier's, Photostat, Central Transcribing, Stationery, Sales, Credit, Traffic, Legal, Safety, Mailing, Labelling, Income Tax, Stock, Purchasing, Public Relations, Employee Relations, Advertising, Insurance, In-
335 dustry Relations, and Real Estate Departments are likewise housed therein; and the Board of Directors of the defendant hold their regular and special meetings therein.

10a. That the factory and plant superintendents have no discretion in the operation of their respective plants and factories, and all production activities are entirely controlled from the Manufacturing Department in the said building.

10b. That the defendant's Manufacturing Department on the seventh floor of the said building is engaged in the following activities in the said building: Issues running instructions to the superintendents of defendant's plants and factories with respect to the operation of said plants
336 and factories; controls the supply of raw materials for every plant and factory and purchases the same; directs when production at a plant or factory should increase or decrease and when a product should be manufactured or discontinued; directs plant expansion and contraction and purchases new equipment for said plants and factories; sets the budgets for the plants and factories; establishes accounting systems at said plants and factories and an accounting control system at the home offices of the defend-

ant in the said building; maintains a staff of engineers who inspect the plants and factories from an efficiency standpoint and report their findings to the home offices.

10c. That the defendant produces its own stationery in the said building. While the actual printing is done in another building, the stationery, letterheads and other printed matter are designed and written in said building. After printing, the products are sent across state lines.

10d. That defendant produces in the said building, among other things, stockholders' reports, balance sheets and other accounting and financial reports. 338

10e. That the plants and factories of the defendant throughout the United States and Canada are completely directed, controlled and supervised by the defendant through defendant's directors, officers and employees housed in the said building.

11. That the ideas regarding the form and contents of advertisements used by the defendant in advertising its products originate in said building; and the rough and final drafts of said advertisements are likewise prepared in said building; none of the advertising is printed in or distributed from said building.

12. That the ideas regarding the form and contents of 339
the labels which are affixed to the Borden Company's products originate in said building; and drafts of said labels are likewise prepared in said building; none of said labels are printed in or distributed from said building.

16. That the defendant's aforesaid directors, officers and employees housed in defendant's said building are employed in occupations necessary to the carrying on by the defend-

340 *Plaintiffs' Exceptions and Proposed Findings.*

ant of production in defendant's plants and factories in various parts of the United States and Canada.

16a. That the defendant's aforesaid directors, officers and employees housed in said building are engaged in producing, manufacturing, handling, and in other manners working on goods in said building.

16b. That the plaintiffs are engaged in producing, manufacturing, handling, and in other manners working on goods in the said building within the meaning of the Fair Labor Standards Act.

341 The plaintiffs submit the following proposed Conclusions of Law:

2. That the defendant is engaged in the production of goods for commerce at premises No. 350 Madison Avenue, in the City, County and State of New York.

4. That the plaintiffs are engaged in interstate commerce.

5. That the plaintiffs are engaged in the production of goods for interstate commerce and in occupations necessary to the production thereof.

6. That plaintiffs are within the coverage of the Fair
342 Labor Standards Act.

7. The plaintiffs should have judgment against the defendant on the issues in this action on the merits.

343

Defendant's Objections to Plaintiffs' Proposed Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

The defendant submits the following objections to the proposed findings of fact and conclusions of law submitted by the plaintiffs:

1. Defendant objects to plaintiffs' proposed findings of fact numbers 7a and 7b on the ground that such proposed 344
findings are not warranted by the evidence, there being no proof that the elevators in defendant's building are unlike elevators in ordinary office buildings.

2. Defendant objects to plaintiffs' proposed finding of fact number 7c on the ground that the same is contrary to the evidence and contrary to the Court's opinion following the trial herein.

3. Plaintiffs' proposed finding of fact number 9 is not objected to.

4. Defendant objects to plaintiffs' proposed finding of fact number 10a on the ground that it is not supported by 345
the evidence.

5. Defendant objects to plaintiffs' proposed finding of fact number 10b on the ground that the same is not supported by the evidence. On the contrary, the evidence establishes (Wyman's deposition, pp. 43, 44) that the activities of the Manufacturing Department on the seventh floor of defendant's building do not embrace or include fluid milk or ice cream.

346 *Defendant's Objections.*

6. Defendant objects to plaintiffs' proposed findings of fact numbers 10c and 10d on the ground that the same are contrary to the evidence and this Court's said opinion.

7. Defendant objects to plaintiffs' proposed finding of fact number 10e on the ground that the same is not supported by the evidence.

8. Defendant objects to plaintiffs' proposed findings of fact numbers 11 and 12 in that said proposed findings limit the origination of ideas as to the form and contents of advertisements and labels to defendant's building at 350 Madison Avenue, whereas defendant's proposed findings of fact numbers 11 and 12 state the facts in this regard as established by the evidence.

9. Defendant objects to plaintiffs' proposed findings of fact numbers 16, 16a and 16b on the ground that they are erroneous conclusions of law, are contrary to the evidence and this Court's said opinion.

10. Defendant objects to plaintiffs' proposed conclusions of law on the ground that the same are erroneous and contrary to this Court's said opinion.

All of which is respectfully submitted.

348 MILBANK, TWEED & HOPE
and
JOHN A. KELLY,
Attorneys for Defendant.

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Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

EDWARD A. CONGER, *U. S. D. J.*

This action having been tried by the Court, without a jury, the Court hereby makes the following Findings of Fact and Conclusions of Law:

1. That the defendant is a foreign corporation organized 350
and existing under and by virtue of the laws of the State of New Jersey.

2. That the defendant is licensed to do business and is doing business in the State of New York and in the Southern District of New York.

3. That the defendant is engaged in the business of processing, manufacturing, selling and distributing fluid, condensed, and evaporated milk, casein, ice cream, butter, cheese and various other products.

4. That the defendant does business throughout the United States and in foreign countries.

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5. That the defendant owns and operates plants and factories in the United States and Canada where it processes, manufactures, sells and distributes its products.

6. That the defendant owns a twenty-four story office building at No. 350 Madison Avenue, in the City, County, and State of New York.

7. That the plaintiffs are building maintenance employees, namely, porters, elevator operators and watchmen who were employed by the defendant in connection with the operation and maintenance of said building.

8. That the defendant maintains its home office in said building and occupies, in whole or in part, approximately seventeen of the twenty-four floors and 58% of the total rentable area.

9. That the President, Executive Vice-President, Vice-Presidents, Treasurer and Assistant Treasurers, Secretary and Assistant Secretaries and other officers of the defend-
353 ant are housed in said building; that the employees in the Manufacturing Department, General Accounting, Public Accounting, Cashier's, Photostat, Central Transcribing, Stationery, Sales, Credit, Traffic, Legal, Safety, Mailing, Labelling, Income Tax, Stock, Purchasing, Public Relations, Employee Relations, Advertising, Insurance, Industry Relations, and Real Estate Departments are likewise housed therein; and the Board of Directors of the defendant hold their regular and special meetings therein.

10. That the defendant directs, supervises, manages and controls its entire business through the aforesaid directors, officers and employees.

354 11. That the ideas regarding the form and contents of advertisements used by the defendant in advertising its products originate in said building and also in the various operations of The Borden Company located outside said building; and the rough and final drafts of said advertisements are likewise prepared in said building and in the various operations of The Borden Company outside said building; and none of the advertising is printed in or distributed from said building.

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12. That ideas regarding the form and contents of the labels which are affixed to The Borden Company products originate in said building, and drafts of said labels are likewise prepared in said building and none of said labels are printed in or distributed from said building.

13. That said Photostat Department, maintained and operated by the defendant in said building, occupies 1,781 square feet or .0153 per cent. of the total area occupied by the defendant in said building; that not more than six employees are employed in said department; that as of April 30, 1942 the cost of the machinery and equipment in said department was the sum of $12,750.75.

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14. That the employees in said department are engaged in making copies of statements, reports and instructions which are transmitted exclusively to the offices and plants of the defendant and its subsidiaries, and none of which are sold or offered for sale.

15. That from October 24, 1938 to December 31, 1938, 5.26 per cent. of these statements, reports and instructions were transmitted to points outside the State of New York; in the year 1939, 5.38 per cent.; in the year 1940, 4.13 per cent.; in the year 1941, 3.99 per cent.; and in the year 1942, 4.41 per cent.

16. That the defendant does not produce, manufacture, handle, process or in any other manner work on any goods in said building.

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17. That the remainder of said building not occupied by The Borden Company is occupied pursuant to written agreements of leases by various persons, firms, partnerships, associations and corporations.

18. That none of said tenants produce, manufacture, handle, process or in any other manner work on any goods in said building.

CONCLUSIONS OF LAW

1. That the defendant is engaged in interstate commerce at premises No. 350 Madison Avenue, in the City, County and State of New York.

2. That the defendant is not engaged in the production of goods for commerce at premises No. 350 Madison Avenue, in the City, County and State of New York.

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3. That the tenants of the defendant are not engaged in the production of goods for commerce at premises No. 350 Madison Avenue, in the City, County and State of New York.

4. That the plaintiffs are not engaged in interstate commerce.

5. That the plaintiffs are not engaged in the production of goods for interstate commerce or in any process or occupations necessary to the production thereof.

6. The plaintiffs are not within the coverage of the Fair Labor Standards Act.

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7. The defendant should have judgment against the plaintiffs on the issues in this action on the merits.

I hereby order and direct that a judgment be entered accordingly.

EDWARD A. CONGER,
United States District Judge.

Dated: New York, New York, January 13, 1944.

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Final Judgment.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

The issues on this action having been duly brought on for trial before Honorable Edward A. Conger, one of the District Judges of the District Court, Southern District of New York, without a jury, at the United States Courthouse, Foley Square, New York, N. Y., on the 19th day of October, 1943, and on motion of the attorneys for the plaintiffs in open court Jesus Echevarria was brought in as an additional party plaintiff, and by further order of the court the action was discontinued as to all parties plaintiff except plaintiffs Joseph Borella, Charles J. Burke, Walter Cross, William L. DeGraaf, John B. Donegan, Stanley Gajda, Edward Gramcko, Stanley Grzeck, Ole Hofseth, William Kay, Alexander Krupica, William Lendo, Thomas Lo Sasso, Robert A. Marshall, Walter C. Menyhart, James McCarthy, Michael November, Leonard B. Quinn, Andrew Rueb, Thomas M. Treacy, and Jesus Echevarria, and they having appeared by counsel and the defendant having appeared by counsel, and the proofs of the parties having been duly heard and considered and the court having directed that the defendant should have judgment against the plaintiffs on the issues in this action on the merits with costs, and the court having filed its findings of fact and conclusions of law on January 13, 1944, and the costs of the defendant having been duly taxed in the sum of $28.75

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Now, on motion of Milbank, Tweed & Hope, and John A. Kelly, attorneys for the defendant, it is

ADJUDGED that the defendant have judgment against the plaintiffs Joseph Borella, Charles J. Burke, Walter Cross,

364 *Final Judgment.*

William L. DeGraaf, John B. Donegan, Stanley Gajda, Edward Grameko, Stanley Grzeck, Ole Hofseth, William Kay, Alexander Krupica, William Lendo, Thomas Lo Sasso, Robert A. Marshall, Walter C. Menyhart, James McCarthy, Michael November, Leonard B. Quinn, Andrew Rueb, Thomas M. Treacy, and Jesus Echevarria, on the issues in this action on the merits with costs and that the defendant do recover of plaintiffs Joseph Borella, Charles J. Burke, Walter Cross, William L. De Graaf, John B. Donegan, Stanley Gajda, Edward Grameko, Stanley Grzeck, Ole Hofseth, William Kay, Alexander Krupica, William Lendo, Thomas Lo Sasso, Robert A. Marshall,
365 Walter C. Menyhart, James McCarthy, Michael November, Leonard B. Quinn, Andrew Rueb, Thomas M. Treacy, and Jesus Echevarria; care of Newgass & Nayfack, 350 Madison Ave. N. Y., N. Y., the sum of $28.75 costs as taxed and that execution issue accordingly.

Dated: February 16, 1944.

Approved

EDWARD A. CONGER,
U. S. D. J.

Judgment rendered,
GEORGE J. H. FOLLMER,
366 Clerk.

Feb. 17, 1944.

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Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOSEPH BORELLA, CHARLES J. BURKE, WALTER CROSS, WILLIAM L. DEGRAAF, JOHN B. DONEGAN, STANLEY GAJDA, EDWARD GRAMCKO, STANLEY GRZECK, OLE HOFSETH, WILLIAM KAY, ALEXANDER KRUPICA, WILLIAM LENDO, THOMAS LO SASSO, ROBERT A. MARSHALL, WALTER C. MENYHART, JAMES MCCARTHY, MICHAEL NOVEMBER, LEONARD B. QUINN, ANDREW RUEB, THOMAS M. TREACY, and JESUS ECHEVARRIA,

Plaintiffs,

against

THE BORDEN COMPANY,

Defendant.

Civil Action
File No. 20-425

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NOTICE IS HEREBY GIVEN that the plaintiffs above named hereby appeal to the Circuit Court of Appeals for the Second Circuit from the final judgment in this action dated February 16, 1944 and entered February 17, 1944, and from each and every part of said judgment as well as from the whole thereof.

Dated: New York, N. Y., February 28, 1944.

369

NEWGASS & NAYFACK,
Attorneys for Appellants,
350 Madison Avenue,
New York, N. Y.

370 *Notice of Appeal.*

To:

MILBANK, TWEED & HOPE, Esqs.,
and JOHN A. KELLY, Esq.,
Attorneys for Defendant,
15 Broad Street,
New York, N. Y.

HON. GEORGE J. H. FOLLMER,
Clerk of the United States District Court
For the Southern District of New York.

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371 **Stipulation as to Contents of Record.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

IT IS HEREBY AGREED AND STIPULATED by and between the attorneys for the respective parties hereto, as follows:

1. Pursuant to Rule 75-f of the Federal Rules of Civil Procedure, the parts of the record, proceedings and evidence to be included in the record on appeal shall be the following:

372 a) A statement under Rule 13 of the General Rules of the United States Circuit Court of Appeals for the Second Circuit;

b) Summons;

c) Complaint;

d) Answer;

e) Deposition of Stephen Everett Wyman;

f) Deposition of Raymond V. Marshall;

g) Affidavit of Stephen Everett Wyman, sworn to September 2, 1943;

h) Affidavit of Raymond V. Marshall, sworn to September 1, 1943;

i) Opinion of Judge Edward A. Conger;

j) Defendant's proposed findings of fact and conclusions of law;

k) Plaintiffs' exceptions to proposed findings of fact and conclusions of law of defendant, and plaintiffs' proposed findings of fact and conclusions of law, and defendant's objections to plaintiffs' proposed findings of fact and conclusions of law;

l) Findings of fact and conclusions of law; 374

m) Final judgment;

n) Notice of appeal;

o) This stipulation.

2. The reporter's transcript of the proceedings at the trial shall not be included in said record on appeal.

3. The appellant shall file with the District Court two printed copies of the record on appeal simultaneously with or prior to the filing of the printed record on appeal in the United States Circuit Court of Appeals, in place of the typewritten copies which are mentioned in Rule 75 of the Federal Rules of Civil Procedure.

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Dated: New York, N. Y., February 28, 1944.

NEWGASS & NAYFACK,
Attorneys for Plaintiffs.

MILBANK, TWEED & HOPE AND
JOHN A. KELLY,
Attorneys for Defendant.

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Stipulation as to Record.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the respective parties hereto, that the foregoing is a true and correct transcript of the proceedings in the District Court in the above entitled action, as agreed on by the parties.

377 Dated, New York, N. Y., March , 1944.

NEWGASS & NAYFACK,
Attorneys for Plaintiffs-Appellants.

MILBANK, TWEED & HOPE AND JOHN A. KELLY,
Attorneys for Defendant-Appellee.

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Clerk's Certificate.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

I, GEORGE J. H. FOLLMER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is the correct printed transcript of record of the said District Court in the above-entitled cause, as agreed on by the parties.

380

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the City of New York in the Southern District of New York on the day of in the year of our Lord one thousand nine hundred and forty-four, and the independence of the United States the one hundred and sixty-eighth.

GEORGE J. H. FOLLMER,
Clerk.

(Seal)

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[fol. 128] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1943

No. 398

(Argued June 9, 1944. Decided July 28, 1944)

JOSEPH BORELLA, et al., Appellants,

v.

THE BORDEN COMPANY, Appellee

Before L. Hand, Swan and Clark, Circuit Judges

Appeal from a judgment of the District Court for the Southern District of New York, dismissing the complaint in an action by employees of the defendant to recover for overtime compensation alleged to be due under §7(a) of the Fair Labor Standards Act.

A. H. Frisch, for the appellants.
John A. Kelly, for the appellee.

[fol. 129] L. HAND, Circuit Judge:

This appeal if from a judgment, dismissing the complaint in an action brought by employees of the defendant to recover for overtime denied them, which they assert to have been due under §7(a) of the Fair Labor Standards Act (§207(a), Title 29, U. S. Code). The facts, which are not in dispute, are sufficiently stated in the findings of the trial judge. The upshot of them is as follows. The defendant is a New Jersey corporation engaged in the milk business, which includes "processing, manufacturing, selling and distributing" milk as such, and making condensed and evaporated milk, "casein, ice cream, butter, cheese and various other products." It has an enormous business, and sends its products throughout the United States, and to foreign countries. The manufacturing all takes place in factories in the United States and Canada, which it owns and operates; but its executive and administrative activities—the supervision, management and control of the entire business—are all centered in an office building in New York, which it owns, and of which it occupies fifty-eight per cent of the total rentable area. It is not necessary to state in

detail the various activities which take place in this building; it is enough to say that here the directors meet; here the president, vice-president, treasurer, assistant treasurer, secretary, assistant secretary, and other corporate officers are housed; here is carried all its accounting; here are its cashier and his assistants; here much of the advertising is devised (though none of it is printed); here its labels are designed; here some of its photostating takes place. This is the spot from which all directions go out as to what shall be bought, what shall be manufactured, where the products shall be distributed, etc. However, no milk is processed here, nor sold from here; nor any casein, butter, cheese or other products. That part of the building which the de- [fol. 130] fendant does not occupy, it leases to others who do not "produce, manufacture, handle, process or in any other manner work on any goods."

The plaintiffs are the service and maintenance employees for the whole of this building: (1.) porters, who keep the corridors, stairways and lavatories of the building clean, who move the furniture, pack the waste paper, distribute the towels, etc.; (2.) elevator operators; (3.) night watchmen, who protect the building by making their rounds and punching their clocks. Although the plaintiffs somewhat faintly assert that they are "engaged in interstate commerce," that is plainly a subsidiary point, their main reliance being that they are "engaged in the production of goods for commerce," within the meaning of §7(a) of the Act.

Since the decision of the Supreme Court in *McLeod* v. *Threlkeld*, 319 U. S. 491, the plaintiffs do well to rely upon the second point, for it is clear that they are not "engaged in commerce." The New York Court of Appeals had already so ruled in an analogous situation (*Stoike* v. *First National Bank*, 290 N. Y. 195), and the Seventh Circuit did the same later. (*Lofther* v. *First National Bank*, 138 Fed. (2) 299.) We may therefore confine our discussion to whether they are "engaged * * * in the production of goods for commerce." It has been several times held, when all the activities of manufacture and sale take place in one building: i. e., the actual handling of the materials and of the finished products, and the administrative direction of the business, that employees in the plaintiffs' position are within the statute. *Fleming* v. *Atlantic Co.*, 40

Fed. Sup. 654, aff'd (though without discussion of the point) 131 Fed. (2) 518 (C. C. A. 5); *Fleming* v. *Swift & Co.*, 41 Fed. Sup. 825, 830 (D. C. Ill.) aff'd (though without discussion of this point) 131 Fed. (2) 249 (C. C. A. 7); *Holland* v. *Amoskeag Machinery Co.*, 44 Fed. Supp. 884 (D. C. N. H.). But such decisions are inconclusive, because after *A. B. Kirschbaum Co.* v. *Walling*, Administrator, [fol. 131] 316 U. S. 517, it would be enough if the quarters occupied by those actually in contact with the materials or the finished goods, were greater in area than those occupied by the administrative officials, as they generally are. It is only when the two groups are separated into different buildings, each cared for by a separate body of employees, that the question before us is tested; although, when that is the situation, it will obviously make no difference whether the separate building is on the same plot as the factory, or across the street, or, as here, in a different city.

The case may, therefore, be further narrowed to whether the administrative agents and employees of a producing company are themselves "engaged * * * in the production of goods for commerce," Since these are words of colloquial speech, having "fringes" of connotation, and unlike the terminology of science, deliberately fabricated for its definite outlines, it is to be expected that interpretation will vary. Nor do we necessarily arrive at the right meaning by a process of step by step examples; as though we should say that, if those who handle the milk are "engaged in production," so must be the foremen who direct them and occasionally lend a hand; and if the foremen, so must be the division superintendents, and so on. While that approach is not illegitimate it can easily lead one astray, for the reason we have just given: that legislators, like others concerned with ordinary affairs, do not deal in rigid symbols, so far as possible stripped of suggestion, and do not expect their words to be made the starting point for a dialectical progression. We can best reach the meaning here, as always, by recourse to the underlying purpose, and, with that as a guide, by trying to project upon the specific occasion how we think persons, actuated by such a purpose, would have dealt with it, if it had been presented to them at the time. To say that that is a hazardous process [fol. 132] is indeed a truism, but we cannot escape it, once we abandon literal interpretation—a method far more un-

reliable. In the case at bar we start with the datum that employees like the plaintiffs are "engaged in production" when they care for the quarters of those who manufacture the goods, or handle them. *A. B. Kirschbaum Co.* v. *Walling*, Administrator, *supra* (316 U. S. 517). That is because those who make or handle them are so engaged, and because the caretakers' work is "necessary" to their activities (§203(j), Title 29, U. S. Code). We are to ask ourselves whether the purpose which included caretakers in that situation, included caretakers in this. Indeed, in one respect the plaintiffs are nearer to "production" than were the employees in *A. B. Kirschbaum Co.* v. *Walling*, Administrator, *supra* (316 U. S. 517); for they were employed directly by the manufacturer, instead of by the manufacturer's lessor. On the other hand they are further from "production," if production must be confined to actual contact with the raw material, or the finished goods. The Tenth Circuit thought that that further remove was enough to take them outside the statute. *Rucker* v. *First National Bank of Miami, Okl.*, 138 Fed. (2) 699, 702 (2nd Col.). But it seems to us that the circumstance that administrative officials do not come in physical contact with the goods at any stage of their production, could not have been thought relevant to the object to be attained. We can conjure up no reason that could have induced Congress, having included employees who made tenantable the quarters of artisans and shipping clerks, to exclude those who made tenantable the quarters of the president, the managers, the cashiers, superintendents and the rest.

We do not indeed mean that here, or in any other interpretation of language, the words used are not far and away the most reliable source for learning the purpose of a document; the motion that the "policy of a statute" does not inhere as much in its limitations as in its affirmations, is un- [fol. 133] tenable. But we are not faced with that difficulty, for there are no words of limitation. The definition of "produced" in §3(j) concludes with the clause: "process or occupation necessary to the production thereof." True, the Supreme Court in *A. B. Kirschbaum Co.* v. *Walling*, Administrator, *supra*, 525 (316 U. S. 517) cautioned us against pressing too literally the word "necessary," but that caution need not disturb us here. Those who direct the whole conduct of an industry—both manufacture and dis-

tribution—are "necessary" to "production," if anyone is "necessary." As was observed over a century ago, every process of manufacture (indeed for that matter every process by which men can affect the outside world at all) may be resolved into the movement of things in space, and it would be absurd to say that, although what the artisans do in the factory, or the dispatching clerks do upon the shipping platforms, is "necessary" to "production," the directions they receive that govern all the movements they impart, are not "necessary." We can therefore see nothing in the language used which should limit the general purpose that, as we have tried to show, comprehends the plaintiffs; and it appears to us that any hesitation to give that purpose its full scope must proceed from a vague compunction that to press the statute so far, is unduly to invade fields which Congress must have meant to leave to local regulation. We do not share that compunction. It is of course true that the whole statute invades fields which were formerly left to local regulation. That Congress did not mean to exercise its power to the full is not important; rather the question is whether we shall say that the borders of those fields which it did choose to occupy, are to be found by considering its object, or whether the realization of that object shall be truncated by irrelevant considerations.

Judgment reversed; judgment directed for the plaintiffs.

[fol. 134] SWAN, Circuit Judge (dissenting):

I think the judgment should be affirmed. Section 3 of the Act, 29 USCA §203(j), provides that "for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof." In my opinion the porters, elevator operators, and night watchmen of the defendant's office building are too remotely related to "the production" of goods for commerce to be within the coverage of the Act. *Rucker* v. *First Nat. Bank of Miami, Okl.*, 138 F. 2d 699, 702 (C. C. A. 10).

[fol. 135] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of August one thousand nine hundred and forty-four.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Charles E. Clark, Circuit Judges.

JOSEPH BORELLA, et al., Plaintiffs-Appellants,

v.

THE BORDEN COMPANY, Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs; judgment directed for the plaintiffs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 136] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Joseph Borella, et al., v. The Borden Company. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 18, 1944. A. M. Bell, Clerk.

[fol. 137] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 138] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 2, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.